3-258

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~278.~~ 81

JAMES M. BARKLEY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF LEVEE COMMISSIONERS OF THE PARISHES OF MADISON AND CARROLL AND THE POLICE-JURY OF THE PARISHES OF MADISON AND CARROLL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 30, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 278.

JAMES M. BARKLEY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF LEVEE COMMISSIONERS OF THE PARISHES OF MADISON AND CARROLL AND THE POLICE-JURY OF THE PARISHES OF MADISON AND CARROLL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Transcript from thirteenth district court, Carroll Parish	1	1
Petition No. 5456	1	1
Clerk's receipt for scrips withdrawn from suits	16	6
Citation	16	6
Sheriff's return on citation	17	7
Default	18	7
Continuance of cause	18	7
Intervention of Carroll and Madison Parishes	18	7
Withdrawal of intervention, and petition and affidavit for removal of case	20	8
Number of suit, number of warrant, amount	21	8
Affidavit of James R. Barkley	27	11
Application for removal	29	12
Power of attorney to Andrew I. Aiken	30	12
Bond for removal of case	34	13
Clerk's certificate to transcript	36	14
Supplemental and amended petition of James M. Barkley	37	15
Citation to William Sutton, president of the board of levee commissioners, &c	44	17
Marshal's return on citation	45	17
Citation to John W. Clark, president, &c	46	17
Marshal's return on citation	47	18
Citation to George C. Benham, president, &c	48	18
Marshal's return on citation	49	19
Exceptions of the police-jury of Madison Parish	50	19
Exception of William Sutton	52	20
Exception and answer of Parish of Carroll	54	20
Motion and order—exceptions fixed	58	21
Hearing and submission of exceptions of police-jury of parish of Madison	59	22
Answer of Sutton to interrogatories on facts and articles	59	22

	Original.	Print.
Exception and prayer for oyer of the police-jury of the parish of Madison.	61	22
Answer of the police-jury of the parish of Madison	64	23
Affidavit of A. I. Aiken	65	24
Order—continuance of exceptions	66	24
Submission of exceptions	66	24
Note of evidence	67	24
Document No. 10 on file in 6517, resolutions of the board of levee commissioners of Carroll and Madison	67	25
Order—exception overruled	71	26
Order of 30th April, 1872, set aside and exception resubmitted	71	26
Motion and order for a delay to furnish brief	72	26
Judgment by default against the board of levee commissioners	72	26
Order on exception	73	27
Order—default stand re-instated	73	27
Motion and order—exceptions fixed	73	27
Writ of fieri facias	77	29
Marshal's return on writ	79	29
Affidavit of James M. Barkley	80	30
Affidavit of James M. Barkley	81	30
Writ of alias fieri facias	84	31
Marshal's return on writ	87	32
Pluries writ of fieri facias	87	32
Marshal's return on writ	89	33
Motion and order—exceptions of parishes of Madison and Carroll fixed	90	33
Rule taken by James M. Barkley	91	34
Marshal's return on rule	91	34
Order—peremptory exceptions overruled	92	34
Amended and supplemental answer of the police-jury of the parish of Madison	92	34
Alias pluries fieri facias	95	35
Notice of demand	98	36
Marshal's return on notice of demand	98	36
Marshal's return on alias pluries fieri facias	99	37
Peremptory exception of police-jury of Madison Parish	100	37
Peremptory exception of Carroll Parish	101	37
Motion and order—peremptory exceptions fixed for trial	101	38
Petition of James M. Barkley for a writ of mandamus	102	38
Rule to show cause why a mandamus should not issue as prayed for	114	41
Marshal's return on rule	115	42
Exception and answer to the rule	116	42
Exception of police-jury of Madison Parish to the rule	120	43
Note of evidence on trial of rule for mandamus	121	44
Hearing and continuance of rule	122	44
Order—continuance of rule	122	44
Testimony of A. H. Arthur	123	45
Hearing and submission of rule	129	47
Decree on the application for a mandamus	130	47
Rule for a new trial	133	48
Marshal's return on rule	133	48
Hearing and order—continuance of rule	134	49
Hearing and submission of rule	134	49
Order—new trial granted on the application for a mandamus	135	49
Decree on the application for a mandamus	135	49
Bill of exceptions No. 1	136	50

	Orignal.	Print.
Bill of exceptions No. 2	138	50
Warrant mentioned in bill of exceptions	143	52
Warrant mentioned in bill of exceptions	144	53
Auditor's report mentioned in bill of exceptions	145	53
Auditor's report mentioned in bill of exceptions	146	54
Auditor's statement marked BB	147	55
Nota.—Document No. 10	149	55
Petition for writ of error	149	56
Order allowing same	151	56
Bond for writ of error	152	56
Clerk's certificate	155	57
Writ of error	156	58
Citation in error and service	157	59
Assignment of error	159	60
Joinder in error	160	60

1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana

JAMES M. BARKLEY
vs.
BOARD LEVEE COMMISSIONERS. } No. 6497.

Transcript from 13th district court, Carroll Parish.
Filed July 21st, 1871.

Plaintiff's petition.

To the hon. the judge of the thirteenth judicial district court of the State of Louisiana, holding sessions in and for the parish of Carroll.

The petition of James M. Barckley, who resides in the city of New Orleans, would respectfully represent that The Board of Levee Commissioners of Carroll and Madison, represented by William Sutton as president, acting under and by virtue of certain acts of the legislature, and having its domicile at Providence, La., and indebted to *them* in the manner and amounts as follows, and for this, to wit, that said
2 board did issue the following-described warrants, which have in the course of trade passed into his hands, viz:

Warrant No. 1603, dated December 21st, 1859, for thirteen hundred and thirty-three dollars, and payable at sight to the order of John Fennimore, and by him endorsed and protested on the 21st December, 1859, for non-payment.

[2]Warrant No. 2036, dated May 1st, 1860, for eight hundred & sixty-nine $\frac{73}{100}$ dollars, and payable the 15th of October, 1860, to the order of J. H. Smith, and by him endorsed, with 8% interest from date.

[3]Warrant No. 1786, dated Feb. 25th, 1860, for five thousand three hundred & thirty-three dollars, to the order of Benj. Folkes, and by him endorsed and bearing 8% interest from date.

[4]Warrant No. 2967, dated May 29th, 1861, for the sum of three hundred dollars, to the order and endorsed by Robert Ramsey, and payable at sight, and protested for non-payment on the 30th of May, 1861.

[5]Warrant No. 1762, dated Feb. 23, 1860, for the sum of six hundred dollars, to the order and endorsed by Millen & McGill, and payable the 15th October, 1860, with 8% interest from date.

[6]Warrant No. 1738, for the sum of five hundred and thirty-three
3 dollars, dated January 30th, 1860, and payable to the order of J. H. Smith, on the 15th of October, 1860, and by him endorsed, and bearing 8% interest from date.

Warrant No. 2027, dated April 16th, 1860, for the sum of eight hundred dollars, and payable October 15th, 1860, to the order and endorsed by Millen & McGill, bearing 8% interest from date.

Warrant No. 1730, dated Jany. 25th, 1860, for the sum of seven hundred & thirty-three dollars, payable at sight to the order of John Fennimore, and by him endorsed and protested on the 25th January, 1860.

Warrant No. 2026, dated April 16th, 1860, for the sum of six hundred & sixty-two dollars, payable at sight to the order and endorsed by Mellen & McGill, and protested on the 16th of April, 1860.

Warrant No. 2028, dated April 16th, 1860, for eight hundred and eighty-one $\frac{26}{100}$ dollars, payable 15th of October, 1860, to the order and endorsed by Mellen & McGill, bearing 8% interest from date.

Warrant No. 2025, dated April 16th, 1860, for seven hundred dollars,

payable at sight to the order of Mellen & McGill, and by them endorsed & protested for non-payment on the 16th April, 1860.

Warrant No. 1913, dated March 24th, 1860, for the sum of one
4 hundred and twenty-two $\frac{51}{100}$ dollars, payable at sight to the order and endorsed by J. H. Smith, and protested on the 24th of March, 1860.

Warrant No. 1581, dated Dec. 10th, 1859, for the sum of fourteen hundred and sixty-one $\frac{33}{100}$ dollars, payable at sight to the order of and endorsed by William Biggs, and protested for non-payment on the 10th of December, 1859.

Warrant No. 1505, dated Nov. 29, 1859, for the sum of one thousand and sixty-six $\frac{67}{100}$ dollars, payable at sight to the order of and endorsed by William Biggs, and protested for non-payment on the 29th of Nov., 1859.

Warrant No. 1785, dated Feb. 25th, 1860, for the sum of eleven hundred & sixty-seven dollars, payable at sight to the order of and endorsed by Benj. Folkes, and protested on the 25th February, 1860, for non-payment.

Warrant No. 1820, dated March 3rd, 1860, for sixteen hundred and sixty-seven dollars, payable at sight to the order and endorsed by John Fennimore, and protested for non-payment on the 3rd of March, 1860.

Warrant No. 1173, dated May 5th, 1859, for fifteen hundred and thirty-three $\frac{28}{100}$ dollars, payable at sight, to the order of and endorsed by L. E. Love, and protested for non-payment on the 5th of May, 1859.

5 Warrant No. 1580, dated Decr. 10th, 1859, for the sum of one thousand dollars, payable at sight to the order, and endorsed by Wm. Biggs, and protested for non-payment on the 10th of Decr., 1859.

Warrant No. 1601, dated Decr. 21st, 1859, for the sum of one thousand dollars, payable at sight to the order of and endorsed by John Fennimore, protested for non-payment on the 21st Decr., 1859.

Warrant No. 1663, dated Jany. 23d, 1860, for the sum of one thousand dollars, payable at sight to the order and endorsed by Folkes & McClusky, and protested for non-payment on the 23rd of Jany., 1860.

Warrant No. 1797, dated Febry. 25th, 1860, for the sum of one thousand dolls., payable at sight to the order of and endorsed by E. B. Toune, and protested for non-payment on the 25th of Feb., 1860.

Warrant No. 1796, dated Feb. 25th, 1860, payable at sight, for the sum of one thousand dolls., to the order of and endorsed by E. B. Toune, and protested for non-payment on the 25th of Feb., 1860.

Warrant No. 1422, dated October 21st, 1859, for fifteen hundred and sixty-seven dollars, payable at sight to the order and endorsed
6 by Joshua James, and protested for non-payment the 21st October, 1859.

Warrant No. 2023, dated April 16th, 1860, for one thousand, at sight, to the order of Mellen & McGill, and by them endorsed and protested for non-payment on the 16th April, 1860.

Warrant No. 1720, dated Jany. 25th, 1860, at sight, to the order of and endorsed by John Fenimore, for one thousand dollars, and protested for non-payment on the 25th Jany., 1860.

Warrant No. 1718, dated Jany. 25th, 1860, at sight, to the order and endorsed by John Fenimore for the sum of one thousand dollars, and protested on the 25th Jany., 1860.

Warrant 1814, dated March 3rd, 1860, for the sum of one thousand dollars, at sight, to the order and endorsed by John Fenimore, and protested for non-payment the 3rd of March, 1860.

Warrant No. 1815, dated March 3rd, 1860, at sight, to the order of John Fenimore, and by him endorsed, for the sum of one thousand dollars, and protested for non-payment the 3rd March, 1860.

Warrant 1579, dated Decr. 10th, 1859, at sight, to the order of and endorsed by William Biggs, for the sum of one thousand dollars,
7 and protested for non-payment on the 10th Decr., 1859.

Warrant No. 2063, dated May 12th, 1860, at sight, to the order of, and endorsed by, John Fenimore, for the sum of seventeen hundred and fifty dollars, and protested for non-payment on the 12th of May, 1860.

Warrant No. 1954, dated March 28th, 1860, at sight, to the order of John Fenimore, & by him endorsed, for the sum of one thousand dollars, and protested for non-payment the 28th March, 1860.

Warrant No. 1949, dated March 28th, 1860, at sight, to the order of John Fenimore, & by him endorsed, for the sum of one thousand dollars, and protested for non-payment the 28th March, 1860.

Warrant No. 1949, dated March 28th, 1860, at sight, to the order of, and endorsed by, John Fenimore, and protested for non-payment the 28th March, 1860.

Warrant No. 1781, dated Feby. 25th, 1860, at sight, to the order of, and endorsed by, Benjamin Folkes, for the sum of two thousand five hundred dollars, and protested on the 25th of Feby., 1860.

Warrant No. 2186, dated 26th May, 1860, at sight, to the order of, and endorsed by, Wm. Biggs, for the sum of five hundred and
8 forty-six $\frac{79}{100}$ dollars, and protested for non-payment May 26th, 1860.

Warrant No. 2057, dated May 12th, 1860, payable 15th October, 1860, to the order of, and endorsed by, John Fenimore, for the sum of one thousand dollars, with 8% interest per annum from date.

Warrant No. 2165, dated May 16th, 1860, at sight, to the order of, and indorsed by, Benjamin Folkes, for the sum of five thousand three hundred & thirty-three dollars, and protested for non-payment on the 16th May, 1860.

Warrant No. 1495, dated Nov. 29th, 1859, at sight, to the order of, and endorsed by, John Fenimore, for the sum of five thousand three hundred & thirty-three $\frac{33}{100}$, and protested for non-payment 29th Nov., 1859.

Warrant No. 1859, dated March 15th, 1860, payable 15th October, to the order of, and endorsed by, T. S. Coons, with 8% interest from date, for the sum of five hundred dollars.

Warrant No. 924, dated April 1st, 1859, payable 15th October, 1859, to the order of, and endorsed by, B. F. Wharton, for the sum of nine hundred & fifteen $\frac{13}{100}$ dollars, bearing 8% interest from date.

Warrant No. 769, dated Feby. 5th, 1859, payable 15th October, 1859, to the order of, and endorsed by, B. F. Wharton, for the sum of
9 twelve hundred dollars, with 8% interest from date.

Warrant No. 1780, dated Feb. 25th, 1860, at sight, to the order of, and endorsed by, Benj. Folkes, for the sum of two thousand five hundred dollars, and protested for non-payment 25th Feb., 1860.

Warrant No. 1813, dated March 3rd, 1860, at sight, to the order of, and endorsed by, John Fenimore, for the sum of one thousand dolls., and protested for non-payment on the 3rd of March, 1860.

Warrant No. 1821, dated March 3rd, 1860, payable 15th October, 1860, to the order of, and endorsed by, John Fenimore, for the sum of three thousand three hundred and thirty-three dollars, with 8% interest from date thereof.

Warrant No. 1936, dated March 26th, 1860, and payable to the order of, and endorsed by, Wm. Biggs, on the 15th of October, 1860, for the sum of eighteen hundred and sixty-seven dollars, with 8% interest per annum from date.

Warrant No. 1665, dated Jany. 23d, 1860, and payable 15th of October, 1860, to the order of, and endorsed by, Folkes & McClusky, for the sum of five thousand four hundred & thirty-two $\frac{66}{100}$ dollars, with 8% interest from date.

Warrant No. 1782, dated Feby. 25th, 1860, at sight, to the
10 order and endorsed by Benjamin Folkes, and protested on the 25th Feby., 1860, for the sum of two thousand five hundred dollars.

Warrant No. 1664, dated Jan. 23d, 1860, at sight, to the order of, and endorsed by, Folkes and McCluskey, for the sum of eighteen hundred & sixty-five $\frac{32}{100}$ dollars, and protested on the 23 Jany., 1860.

Warrant No. 1662, dated Jany. 23,1860, at sight, to the order of Folkes & McClusky, and by them endorsed, for four thousand dollars, and protested on the 23d Jany., 1860.

Warrant 1661, dated Jany. 23d, 1860, at sight, to the order of, and endorsed by, Folkes & McClusky, for the sum of four thousand dollars, and protested 23d Jany., 1860.

Warrant No. 1935, dated March 26th, at sight, to the order of, and endorsed by, Wm. Biggs, for the sum of seven hundred and thirty-three dollars, and protested 26th March, 1860.

Warrant No. 1995, dated April 5th, 1860, at sight, to the order of, and endorsed by, Wm. Biggs, and protested 5th April, 1860.

Warrant No. 1996, dated April 5th, 1860, at sight, to the order of, and endorsed by, Wm. Biggs, for the sum of one thousand dollars, and protested the 5th of April, 1860.

Warrant No. 1932, dated March 28th, 1860, at sight, to the order of, and endorsed by, Wm. Biggs, for the sum of one thousand dollars,
11 and protested 26th March, 1860.

Warrant No. 1934, dated March 26th, 1860, to the order of, and endorsed by, Wm. Biggs, for the sum of one thousand dollars, and protested 26th March, 1860.

Warrant No. 1933, dated March 26th, 1860, at sight, to the order of, and endorsed by, Wm. Biggs, for one thousand dollars, and protested March 26th, 1860.

Warrant No. 1956, dated March 28th, 1860, at sight, to the order of, and endorsed by, John Fenimore, and protested on the 28th March, 1860.

Warrant No. 1732, dated January 28th, 1860, and payable on the 15th October, 1860, with 8% interest per annum from date.

Warrant No. 1957, dated March 28th, 1860, at sight, to the order of, and endorsed by, John Fenimore, for sixteen hundred dollars, and protested on the 28th March, 1860.

Warrant No. 1952, at sight, to the order of, and endorsed by, John Fenimore, for one thousand dollars, and protested March 28th, 1860.

Warrant No. 1633, dated Jany. 2nd, 1860, payable 15th October, 1860, with 8% interest from date.

Warrant No. 2035, dated May 1st, 1860, and payable 15th October, 1860, to the order and endorsed by J. H. Smith, for one thousand dollars, with 8% *per cent.* interest from date.

12 Warrant No. 2058, dated May 12th, 1860, and payable 15th October, 1860, to the order of, and endorsed by, J. Fenimore, for the sum of eleven hundred and thirty-three dollars, with 8% interest from date.

Warrant No. 2101, dated May 12th, 1860, at sight, to the order of John W. Nollay, and by him endorsed, for the sum of three hundred and fifty-four dollars, and protested on the 12th May, 1860.

Warrant No. 2092, dated May 12th, 1860, at sight, to the order of James Walsh, and by him endorsed, for the sum of one hundred and thirty-one dollars, and protested on the 12th May, 1860.

Warrant No. 2218, dated Nov. 12th, 1860, at sight, to the order of T. C. Bedford, and by him endorsed, for the sum of one thousand dolls., and protested on the 12th Novr., 1860.

Warrant No. 2424, dated Decr. 27th, 1860, at sight, to the order of John Kileen, for the sum of eight hundred dollars, subject to a credit of six hundred and ninety-eight $\frac{21}{100}$, paid 20th May, 1861, and protested May 24th, 1861.

Warrant No. 2225, dated Novr. 12th, 1860, at sight, to the
13 order of Benj. Folkes, for one thousand dollars, and by him endorsed for and protested Novr. 12th, 1860.

Warrant No. 2055, dated 12th May, 1860, at sight, to the order of J. Fenimore, and by him endorsed, for the sum of one thousand dollars, and protested the 12th May, 1860.

Warrant No. 2024, dated the 16th April, 1860, payable at sight to the order of Mellen & McGill, and by them endorsed, for the sum of one thousand dollars, and protested 16th April, 1860.

Warrant No. 1814, dated March 3rd, 1860, at sight, to the order of and endorsed by John Fenimore, for one thousand dollars, and protested on the 3d of March, 1860.

Warrant No. 2736, dated March 30th, 1860, at sight, to the order of and endorsed by Zeigler Marcy & Co., for the sum of one thousand dollars, and protested March 31st, 1861.

Warrant No. 2088, dated May 12th, 1860, at sight, to the order and endorsed by Mellen & McGill, for three hundred and fifteen dollars, and protested May 16th, 1860.

Warrant No. 2062, dated May 12th, 1860, at sight, to the order of and endorsed by J. D. Eccles, for the sum of six hundred and thirty
14 dollars, and protested on the 12th of May, 1860.

Warrant No. 2144, dated May 16th, 1860, at sight, to the order of Mullen & McGill, for the sum of eleven hundred and ninety-three $\frac{17}{100}$ dollars, and protested on the 16th of May, 1860.

Warrant No. 2159, dated May 16th, 1860, at sight, to the order of Wm. Biggs, for the sum of one hundred and sixty-one $\frac{52}{100}$ dollars, protested the 16th May, 1860.

Warrant No. 2145, dated May 16th, and payable 15th October, 1860, to the order of Mellen & McGill, for five hundred and ninety-six $\frac{58}{100}$ ($596\frac{58}{100}$) dollars, with 8 % interest per annum from date.

Warrant No. 2112, dated May 12th, 1860, at sight, to the order of and endorsed by Mike Sullivan, for the sum of nineteen $\frac{25}{100}$ dollars, and protested May 12th, 1860.

Warrant No. 2111, dated May 12th, 1860, at sight, to the order of and endorsed by Patrick Bradly, for the sum of twenty-eight $\frac{62}{100}$ dolls., and protested for non-payment on the 12th of May, 1860.

All of which will appear by reference to the various warrants herewith filed and made part of this petition.

Petitioner shews that under the laws and ordinances of said Board of Levee Commissioners, all warrants not paid for want of funds
15 should bear 8 % interest per annum from protest until paid.

Petitioner alleges amicable demand and failure of payment. Wherefore, the premises considered, petitioner prays that William Sutton,

as president of the Board of Levee Commissioners of the parishes of Carroll and Madison, may be cited to answer hereto, and served with a copy of this petition, and upon due proof that your have and recover judgment against him, in his capacity aforesaid, for the several amounts hereinbefore described, with 8 % per annum interest thereon from due until paid, with costs of suit and costs of internal-revenue stamps, and for relief generally.

HYMES & GORDEN,
Attorneys.

(Endorsement:) No. 5456. James Barkley vs. Board of Levee Commissioners. Filed Augst. 23rd, 1867. Robt. J. Loudon, dy. clerk.

16 *Clrk.'s receipt for scrip withdrawn from suits.*

I certify that the following pieces of levee-scrip were withdrawn from suits:

No. 5337	No. 2585	$1,200 50
"	" 86	1,000 00
"	" 2587	1,000 00
"	" 2597	1,168 00
"	" 2600	1,000 00
"	" 2599	1,000 00
"	" 2328	1,000 00
"	" 2329	1,000 00
"	" 2330	1,733 00
"	" 2380	800 00
"	" 2397	1,000 00
"	" 2396	100 00
"	" 2596	1,295 00
"	" 2583	1,000 00
"	" 2595	1,000 00
"	" 2429	1,328 00

Citation.

JAMES BARKLEY
vs.
LEVEE COMMISSIONERS. } No. 5456.

STATE OF LOUISIANA,
Parish of Carroll, Thirteenth District Court:

The State of Louisiana and said court to William Sutton, president Board of Levee Commissioners, residing in said parish and State, greeting:

17 You are hereby summoned either to comply with the demand contained in the petition of the said James Barkley, a duly-certified copy of which accompanies this citation, or to deliver your answer to the said petition, in writing, in the office of the clerk of said court, held at Floyd, in said parish, within thirteen days after service hereof and according to laws.

Witness the honorable Edgar D. Farrar, judge of the said court, and the seal of the said court, this 26th day of August, the year of our Lord 1867.

J. L. CHEATHAM,
Clk.
Per ROBT. J. LOUDON,
Depy. Clk.

Delivered Aug. 26, '67.

Sheriff's return on citation.

Received, Floyd, Carroll Parish, Louisiana, August the 26th, A. D. 1867, the within citation, together with a certified copy hereof, and a certified copy of plaintiff's petition, and on the 4th day of September, A. D. 1867, served said copies by handing the same to Israel Lombard, a free white person above the age of fourteen years, at and residing at the residence of Wm. Sutton, in said parish & State, he, the said
18 Sutton, being absent frome home at the time of service hereof.

WM. W. COLLINS, *Shff.*

(Endorsement:) No. 5456. Citation returned & filed Sept. 10th, 1867. I. L. Cheatham, clerk.

TUESDAY, *October the 8th*, 1867.

JAMES BARCLAY *vs.* LEVEE COMMISSIONERS. } 5456. Minutes.

Default.

MONDAY, *May the 30th*, 1870.

JAMES BARKLEY *vs.* LEVEE COMMISSIONERS. } 5456. Minutes.

Continued.

THURSDAY MORNING, *December the 1st*, 1870.

JAMES BARKLEY *vs.* LEVEE COMMISSIONERS. } 5456. Minutes.

Intervention on part of Carroll and Madison Parishes filed by leave of court.

Petition of intervention.

JAMES M. BARCLAY *vs.* LEVEE COMMISSIONERS. } No. 5456.

To the hon. the judge of the thirteenth judicial district court in and for the parish of Carroll, State of Louisiana:

The petition of the police-jury of the parish of Madison, with
19 respect, shows: That in the case as above styled, No. 5456, James M. Barclay vs. Levee Commissioners, on the docket of this court, the plaintiff is seeking to enforce the claim set forth against said Board of Levee Commrs., a corporation which has long since ceased to exist as a judicial person.

That the parties really in interest as defendants are the parishes of Carroll and Madison. That should a judgment be rendered in favor of said plaintiffs, the execution thereof would be enforced against the property of the citizens of said parishes, and that they are the real parties in interest, and that your petitioners, as the representatives of the parish of Madison, have a large pecuniary interest in the result of this suit.

They therefore pray to be allowed to file this their petition of intervention, and to join the defendants in resisting plaintiff's demand; and, in addition to the defence already set up by said defence, they further

show your honorable court that a board of levee commissioners of the parishes of Carroll and Madison, herein sued, have, by the death or resignation of all its members, ceased to exist as a corporate body, and is incapable of standing in judgment.

And for answer, they further aver and plead a peremptory exception, the prescription of five years, and prescription generally; and further pray that plaintiff's demand be rejected at his costs, and for general relief, and that the parties be cited to appear and answer hereto.

WM. J. DUNCAN,
Of Counsel for Defence.

(Endorsement:) James M. Barclay vs. Board of Levee Commissioners. No. 5456. Petition of intervention of the parish of Madison. Filed Decr. 1st, 1870. R. J. Loudon, dy. clk.

SATURDAY, *December the 3rd*, 1870.

JAMES M. BARKLEY *vs.* LEVEE COMMISS'RS. } Minutes.

Petition of intervention withdrawn, and petition & affidavit for removal filed, and ordered that suit be transferred to U. S. circuit court for the dist. of La., upon plff.'s giving bond favor of defts. in the sum of five hundred dollars.

No. of suit.	No. of warrant.	Amount.
5338	2850	1,000 00
"	2697	860 00
"	2703	1,000 00
"	2598	1,000 00
"	2499	500 00
"	2481	502 20
5339	2628	500 00
"	2630	500 00
"	2626	200 00
"	2618	500 00
"	2630	500 00
"	2617	500 00
"	2621	500 00
"	2623	500 00
5340	1817	1,000 00
"	2126	2,667 00
"	1822	2,000 00
5341	1447	99 00
"	2576	1,333 00
"	2916	1,134 00
"	2918	1,000 00
5342	2700	250 00
5343	2959	177 50
"	2809	500 00
"	2925	756 25
"	2868	500 00
"	2607	200 00
"	2811	500 00
"	2790	1,600 00
"	2803	2,000 00
22 5343	2470	$1,100 00
"	2900	800 00
"	2926	1,000 00
"	2860	500 00
"	2791	1,600 00
"	2832	300 00

	No. of suit.	No. of warrant.	Amount.
	"	2879	388 00
	5344	2680	1,500 00
	5345	2518	250 00
	"	2398	933 00
	"	2356	3,000 00
	"	2512	500 00
	"	2921	1,000 00
	"	1784	1,000 00
	"	2545	1,780 00
	"	2758	1,333 00
	"	370	193 00
	5346	2992	1,000 00
	5348	2633	2,000 00
	"	2631	4,000 00
	"	2634	2,000 00
	"	2640	2,000 00
	"	2644	1,000 00
	"	2643	1,000 00
	"	2466	2,386 40
	"	2465	4,772 80
	"	2386	2,513 47
	"	2285	2,500 00
	5350	2641	2,000 00
	"	2642	2,000 00
23	5350	2927	$1,000 00
	"	2505	500 00
	"	2635	2,000 00
	"	2520	250 00
	"	2839	1,000 00
	"	2419	1,000 00
	"	2715	880 00
	"	2520	250 00
	5352	1744	1,600 00
	"	1611	2,613 00
	"	2420	800 00
	"	2460	1,600 00
	"	2338	3,200 00
	"	2425	2,586 68
	"	2564	774 40
	5454	2851	1,000 00
	"	2566	1,000 00
	"	2554	1,500 00
	"	2845	1,673 60
	"	1076	120 00
	5455	2457	600 00
	"	1982	2,000 00
	"	2616	400 00
	"	3033	300 00
	"	2483	761 00
	"	2482	322 00
	"	2469	1,135 25
	"	2458	500 00
	"	2000	1,500 00

24 I hereby certify that the above and foregoing is a true and correct statement of the No. of suits and number of warrants filed in said suits vs. Board of Levee Commissioners in this court, the original warrants having been withdrawn by F. F. Montgomery, atty., (per Chas. Pilcher,) *atty.* for plff.

Given under my hand.

P. W. DE FRANCE,
Dy. Clerk.

No. of suit.	No. of warrant.	Amount.
5456	1603	$1,333 00
"	2036	869 76
"	1786	5,333 00
"	2067	300 00
"	1762	600 00
"	1738	533 00
"	2027	800 00
"	1730	733 00
"	2026	662 00
"	2028	880 25
"	2025	700 00
"	1913	122 50
"	1581	1,461 33
"	1505	1,066 67
"	1785	1,167 00
"	1824	1,660 00
"	1173	1,533 28
"	1580	1,000 00
"	1601	1,000 00
25 5456	1663	$1,000 00
"	1797	1,000 00
"	1796	1,000 00
"	1423	1,567 00
"	2023	1,000 00
"	1720	1,000 00
"	1718	1,000 00
"	1814	1,000 00
"	1815	1,000 00
"	1579	1,000 00
"	2063	1,750 00
"	1954	1,000 00
"	1949	1,000 00
"	1781	2,000 00
"	2186	546 70
"	2057	1,000 00
"	2165	5,333 00
"	1495	5,333 00
"	1859	500 00
"	924	915 13
"	769	1,200 00
"	1780	2,500 00
"	1813	1,000 00
"	1821	3,333 00
"	1936	1,867 00
"	1665	5,432 66
"	1782	2,500 00
"	1664	1,865 00
"	1662	4,000 00
"	1661	4,000 00
26 5456	1935	733 00
"	1995	1,000 00
"	1996	1,000 00
"	1932	1,000 00
"	1934	1,000 00
"	1933	1,000 00
"	1956	1,000 00
"	1732	3,000 00
"	1957	1,600 00
"	1952	1,000 00
"	1623	1,248 00
"	2035	1,000 00
"	2037	1,133 00
"	2101	354 00
"	2092	131 00
"	2216	1,000 00

No. of suit.	No. of warrant.	Amount.
"	(2424	800 00
(Subject to a	deduction	of 698 00)
"	2225	1,000 00
"	2055	1,000 00
"	2024	1,000 00
"	1814	1,000 00
"	2736	1,000 00
"	2088	315 00
"	2062	630 00
"	2144	1,193 00
"	2159	161 50
"	2145	396 50
"	2112	19 75
"	2111	2,866 00

27 I hereby certify that the above and foregoing is a true and correct statement of the Nos. of suits & Nos. of warrants filed, and the amounts due on said warrants filed in said suit, vs. Board of Levee Commissioners in this court, the original warrants having been withdrawn by F. F. Montgomery, atty. (per Chas. Pilcher) *atty.* for pltff.

Given under my hand and seal this 8th day of Feby., A. D. 1871.

P. W. DE FRANCE,
Dy. Clerk.

(Endorsement:) James A. Barklay vs. Board Levee Commissioners. Filed Feby. 8th, 1871. P. W. De France, dy. clk.

Affidavit of plff.

STATE OF TENNESSEE,
County of Washington:

This day James R. Barkley personally appeared before the undersigned authority, and made oath that in a suit now pending in the district court of Carroll Parish, State of Louisiana, styled James M. Barclay vs. The Board of Levee Commissioners of the parishes of Carroll and Madison, in which affiant is pltff., and numbered on the
28 docket of said court 5456, he has reason to believe, and does believe, that owing to prejudice and local influence he will be unable to obtain justice in said court.

JAMES M. BARCLAY.

Sworn to and subscribed before me on this 31st day of October, A. D. 1870.

JOHN F. GRESHAM,
Clk. County Court, Washington County, Tenn.

I certify that John F. Gresham, before whom the within affidavits was sworn to, is clerk of the county court of Washington County, Tennessee, and that full faith and credit is due to all his official acts.

Given under my hand this 1st day of Nov., 1870.

G. W. TILFORD,
Chairman of the County Court of Wash'ton Co., Tenn.

STATE OF TENNESSEE,
Washington County:

I, John F. Gresham, clerk of the county court of said county, hereby certify that G. W. Tilford, esqr., is chief-justice or chairman of our county court, duly elected and qualified, and that all his official acts as such are entitled to full faith and credit.

29 Witness my hand and official seal of office, in Jonesborough, this 2nd day of Nov., 1870.

JOHN F. GRESHAM, *Clerk.*

(Endorsement:) 5456. J. M. Barclay vs. Board Levee Commissioners. Affidavit.

Application for removal.

To the hon. the judge of the 13th judicial district of Louisiana, in and for the parish of Carroll:

The petition of James Barclay, a resident of the State of Tennessee, with respect, shows that on the 23rd day of August, 1867, he filed his suit in your said court against the Board of Levee Commissioners of the parishes of Carroll and Madison, which suit is numbered on the docket of said court 5456; shows that said suit is still pending in said court; shows that owing to prejudice and local influence he has reason to believe, and does believe, he will not be able to obtain justice in said court.

30 Wherefore he prays that, upon compliance with the requirements of the law, the said case may be removed from this court to circuit court of the United States for this district, holden in the city of New Orleans, La.

For all necessary orders and general relief.

F. F. MONTGOMERY, *Atty.*

(Endorsement:) 5456. J. M. Barclay vs. Levee Commissioners. Pet. & affidavit. Filed Novr. 30th, 1870. R. J. Loudon, dy. clerk.

Power of attorney to Andrew J. Aiken.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Be it known that on this fifteenth day of April, eighteen hundred and seventy-one, before me, John G. Eustis, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, personally came and appeared Andrew J. Aiken, of this city, who produced unto me, notary, a certain instrument in writing, under

31 private signature, purporting to be a power of attorney, executed on the 21st of June, 1867, by James M. Barclay, a resident of Washington County, Tennessee, which instrument is annexed hereto and made part hereof, and is in words and figures as follows, to wit:

Know all men by these presents, that I, James M. Barclay, a resident of Washington County, Tennessee, do hereby appoint Andrew J. Aiken to be my true and lawful attorney in fact, general & special, giving and by these presents granting unto the said attorney full power and authority to transact all and singular my affairs, and generally to do and perform all and every act as shall may be requisite or necessary concerning my business, as fully and effectually as if I were personally present. I especially authorize him to draw, endorse, and accept bills of

exchange, to make checks and draw money out any bank or banks wherein the same may have been deposited in my name; to sell and transfer all or any shares of the capital stock of any railroad company, or bank, or other corporate body or bodies owned by me, and to
32 receive and receipt for the dividends due or to become due thereon, to pledge all or any shares of the capital stock of any railroad company, bank, or other corporate body or bodies owned by me, and to make or give any note or notes which may be necessary from time to time for the renewal of the same; to attend all or any meetings of the creditors wherein I may be interested, and vote in my name on all questions that may be submitted to such meetings; also to sell, transfer, and convey, or to mortgage all or any part of the lands or real estate owned by me; to receive the price of such sales; to lease or hire all or any part of the real estate, and to receive and receipt for the rent and wages thereof as the same may fall due, and, for the full execution of the purposes aforesaid, to make, sign, and execute in my name all acts, whether of sale, mortgage, lease, contract, deed, agreement, or otherwise, as shall or may be requisite or necessary; to sign all bonds or other acts required by the revenue department at the custom-house of this district, or elsewhere, and to ask for, sue, and by all lawful means
33 to recover and receive of and from all and every person or persons whomsoever, body or bodies corporate, all such sums of money or property as now is or may be in my custody or possession, and to that end with whom it may concern, to appear before all the courts of law and equity, and to prosecute and defend, as occasion may require, and to compromise by arbitration or otherwise as the said attorney in his discretion may think fit.

In witness whereof I have hereunto set my hand and seal this the 21st day of June, 1867.

(Signed) JAMES M. BARKLAY.

Test:

(Signed) W. F. PAYNE.
G. S. CECIL.

And requested of me that I should make an act of deposit of the same, which I, said notary, have accordingly done by entering the same in my current register. This done and passed at my office, in the city of New Orleans, in the presence of Andrew I. Armstrong and Ernest J. Clements, lawful witnesses residing in this city, who have hereunto
34 signed their names with me, notary, on the year, month, and day first above written.

(Signed) J. G. EUSTIS,
Not. Pub.

(Signed) ERNEST J. CLEMENTS.
(") A. J. ARMSTRONG.

I certify the above to be a true copy of the original in my office, (stamped fifty cents.)

I. G. EUSTIS,
Not. Pub.

NEW ORLEANS, 15*th April*, 1871.

(Endorsement:) 15th April, 1871. Power of attorney. James M. Barklay to Andrew J. Aiken. J. G. Eustis, not. pub. Filed May 1st, 1871. P. W. De France, dy. clerk.

Bond for removal.

District court, Carroll Parish, Louisiana.

JAMES M. BARKLEY
vs.
BOARD OF LEVEE COMMISSIONERS OF CARROLL & Madison Parishes.

Know all men by these presents that we, James M. Barclay, plaintiff in the above-styled suit, principal, and Field F. Montgomery, as security, are held and firmly bound unto William Sutton, president of said board, to said Board of Levee Commissioners, defendant, and
35 to all other persons in interest herein, in the sum of five hundred dollars; for the payment of which well and truly to be made we bind ourselves, our heirs and legal representatives, firmly by these presents, this 3d day of December, A. D. 1870. Whereas James M. Barkley has heretofore filed a suit against said Board of Levee Commissioners, styled and numbered as above, in said district court, and has obtained an order removing same to be tried in the circuit court of the United States for this district, as provided by act of Congres: Now the condition of this obligation is such, that if the said Barkley, plaintiff, shall file in said U. S. circuit court a copy of all the process, pleadings, depositions, testimony, and other proceedings in said suit as required by law, and shall do such other appropriate acts as by law are required to be done, and shall well and truly pay and discharge such judgment as shall or may be rendered against him, then this obligation to be null & void; else to remain in full force and virtue. Done and signed by us the date above written.

P. Pro., JAMES M. BARKLEY.
ANDREW J. AIKEN.
F. F. MONTGOMERY, (*Security.*)

36 (Endorsement:) J. M. Barkley vs. Board Levee Commissioners. Bond. Filed May 1st, 1871. P. W. De France, dy. clk.

Clerk's certificate.

Thirteenth district court.

STATE OF LOUISIANA,
Parish of Carroll:

I, Robert K. Anderson, clerk of said court in and for the parish of Carroll, State of Louisiana, duly commissioned and qualified, do hereby certify that the foregoing twenty-seven pages contain a true copy and complete transcript of all the papers filed, orders of court, and proceedings had, all the testimony adduced on the trial in the case wherein James M. Barkley is plaintiff and The Board of Levee Commissioners of Carroll & Madison Parishes are defendants, known on the docket of our said court as suit No. 5456, as the same remains on file and of record in my office.

Given under my hand & seal of said district court this the 2nd day of May, A. D. 1871.

[SEAL.]

R. K. ANDERSON,
Clerk.

37 *Amended petition.*—(*Filed Augst. 7th*, 1871.)

U. S. circuit court, fifth circuit & district of Louisiana.

JAMES M. BARKLEY
vs.
BOARD OF LEVEE COMMISSIONERS OF CARROLL & MADISON, &c. } No. 6497.

To the hon. the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The supplemental & amended petition of James M. Barkley, a citizen of the State of Tennessee, respectfully represents that in the original petition filed in this case in the State court, and now removed to their hon. court, by mistake of his attorney, petitioner's residence was stated in said original petition to be in the city of New Orleans, when it was in truth and in fact in the State of Tennessee, of which said State of Tennessee petitioner was then, and has been hitherto, a resident as well as a citizen.

Petitioner further represents that the Board of Levee Commis-
38 sioners of the levee-district composed of the parishes of Carroll and Madison, in said State of Louisiana, mentioned in said original petition, was a body-corporate, of whom the said William Sutton was president; said corporation having power, among other things, to make contracts for the building of levees to protect the lands of said parishes of Carroll and Madison from overflow, & levy taxes for the payment of the indebtedness created by the building of such levees; that their acts as such board were binding and obligatory upon all the inhabitants and owners of taxable property & upon the taxable property in said parishes of Carroll and Madison; that the said warrants drawn by the president of said Board of Levee Commissioners, & countersigned by the secretary of said board, upon the treasurer of said board, described in the original petition, were binding obligations upon said Board of Levee Commissioners, and all persons owning taxable property, and taxable property in said levee-district, and that the president,
39 officers, and members of said Board of Levee Commissioners and said board are citizens of the State of Louisiana.

Petitioner further represents that after the service of the petition & citation in this case upon William Sutton, esq., the president of the said Board of Levee Commissioners, the police-jury of the said parish of Madison filed an intervention in this case, wherein said police-jury, among other things, alleged that said Board of Levee Commissioners have ceased to exist as a judicial person, & that the parishes of Carroll & Madison alone are interested in defending this suit.

Petitioner further represents that his rights cannot be defeated by the voluntary abandonment of said Board of Levee Commissioners of the offices which they held, or their neglect to meet as a board, and that petitioner has the right to consider and hold said Board of Levee Commissioners who created said obligations as still in existence, & the service of the petition and citation on said William Sutton, presi-
40 dent of said Board of Levee Commissioners, as binding upon said Board of Levee Commissioners as an existing corporation, and upon not only the police-juries of said parishes of Madison and Carroll, but also upon all persons residing in or holding taxable property in said parishes of Carroll & Madison, and upon all taxable property in said parishes of Madison and Carroll, and a right to cause said Board of Levee Commissioners and the police-juries of said parishes of Madison &

Carroll, according to their respective proportions, to levy taxes for the payment to petitioner of said obligations sued on.

Wherefore petitioner prays for leave to amend his original petition in the particulars aforesaid, and that the said Board of Levee Commissioners for Carroll and Madison, and the police-juries of the said parishes of Carroll and Madison, be duly cited to answer the original amended and supplemental petition in this case; that petitioner do have and recover judgment against the said Board of
41 Levee Commissioners of said parishes of Carroll and Madison, as well as against the police-juries said parishes of Carroll and Madison, severally and according to their respective portions, for the said several sums of money set forth in the original petition, & interest thereon at eight per cent. per annum from the maturity of each of said obligations, and costs, and that they assess taxes for the payment thereof, and that said William Sutton, president of said Board of Levee Commissioners for said parishes of Carroll and Madison, be ordered to answer the annexed interrogatories on facts and articles, and for general relief in the premises.

Interrogatories to William Sutton, president:

Int. 1st. Did you not receive, in your said capacity of president of said board, the original petition and citation issued in this case, entitled James Barkley *vs.* Board of Levee Commissioners, No. 5456, 13th judicial dist. court, parish of Carroll, about the fourth day of Sep-
42 tember, A. D. 1867, and before the end of said month, at said parish of Carroll? If not, at what time and in what capacity did you so receive said petition & citation?

Int. 2nd. Did you not, as president of said Board of Levee Commissioners, take said original petition and citation to a lawyer and consult him on behalf of said board after the same came into your hands? If not, in what capacity did you take said petition and citation to a lawyer?

Int. 3rd. Were you not elected or appointed as president of the Board of Levee Commissioners of the parishes of Carroll and Madison as early as some time in the year 1859, and did you not sign the levee-warrants sued on, purporting to be signed by you, as president of said board, in that capacity? Have you not acted as president of the Board of Levee Commissioners since the passage of the act of the legislature approved 28th March, 1867? What officers acted with you, (viz:) Who was treas-
43 urer and secretary of said board at the meeting of said board since the passage of the act of the legislature of 28th of March, 1867? Where are the records of the proceedings of the Board of Levee Commissioners during and since said year 1867?

(Signed) THOS. McCAY,
RACE FOSTER, &
E. T. MERRICK,
Attys. for Pltff.

Order.

Leave is hereby granted the said plaintiff to file the foregoing amended and supplemental petition, and said William Sutton, president of said Board of Levee Commissioners, is ordered to answer said interrogatories on facts and articles on or before the rule-day of the court which shall happen next after twenty days from and after the service of a copy of the said amended and supplemental petition upon the said Sutton, or his attorney or solicitor.

August 1st, 1871.

(Signed) JOSEPH P. BRADLEY,
Associate Just. Sup. Ct. U. S., &c.

44 *Citation to William Sutton, president of Board of Levee Commissioners, &c.—Issued August 7th, 1874.*

The President of the United States of America to the marshal of the District of Louisiana, greeting:

JAS. M. BARKLEY
vs.
BOARD OF LEVEE COMMISSIONERS of CARROLL and Madison & al. } No. 6497.

You are hereby commanded to summon William Sutton, president of Board of Levee Commissioners, &c., citizens of the State of Louisiana, to comply with the demand of James M. Barkley, a citizen of the State of Tennessee, contained in the original petition and supplemental & amended petition, of which copies accompany this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New
45 Orleans, the place where the court is held.

And that you make due return hereof on the first Monday of September, 1871.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 7th day of September, A. D. one thousand eight hundred and seventy-one, and the 95th year.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk,
By F. B. VINOT,
Dy. Clerk.

Marshal's return.

Received August 9th, 1871, by the U. S. marshal, and on the 12th day of same month and year served a copy of within citation and accompanying petition and supplemental petition on Wm. Sutton, named herein, by handing the same to R. B. Scott, manager of Sutton's plantation, at the domicil of said Sutton, 6 miles above Lake Providence, in the parish of Carroll, the within-named Wm. Sutton being absent from the parish and State.

(Signed) S. W. REED,
Dy. U. S. Marshal.

NEW ORLEANS, *August 16th*, 1871.

46 *Citation to John W. Clark, president, &c.—(Issued Aug. 7th*, 1871.)

The President of the United States of America to the marshal of the district of Louisiana, greeting:

JAS. M. BARKLEY
vs.
BOARD OF LEVEE COMMISSIONERS OF CARROLL & Madison & al. } No. 6497.

You are hereby commanded to summon John W. Clark, president of the police-jury of the parish of Madison & al., citizen of the State of ,

to comply with the demand of James M. Barkley, a citizen of the State of Tennessee, contained in the original petition and the supplemental and amended petition, of which copies accompany this citation, or to deliver his answer to the same, in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from
47 New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of September, 1871.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 7th day of August, A. D. one thousand eight hundred and seventy-one, and the 95th year.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk,
By F. B. VINOT,
Dy. Clerk.

Marshal' return.

Received Aug. 9th, 1871, by the U. S. marshal, and on the 14th day of same month and year served a copy of within citation and accompanying petition and supplemental petition on John W. Clark, named herein, by handing the same to A. M. Cramer, clerk of police-jury, in the town of Delta, in the parish of Madison.

(Signed) S. W. REED,
Dy. U. S. Marshal.

NEW ORLEANS, *August 16th*, 1871.

48 *Citation to George C. Benham, president of the police-jury of the parish of Carroll, & al.*—(*Issued August 7th*, 1871.)

JAMES M. BARCLAY
vs.
BOARD OF LEVEE COMM'R' OF CARROLL & Madison & al. } No. 6497.

You are hereby commanded to summon George C. Benham, president of the police-jury of the parish of Carroll, & a citizen of the State of Louisiana, to comply with the demand of James M. Barkley, a citizen of the State of Tennessee, contained in the original petition and the supplemental & amended petition, of which copies accompany this citation, or to deliver his answer to the same, in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held. And that
49 you make due return hereof on the first Monday of September, 1871.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 7th day of August, A. D. one thousand eight hundred and seventy-one, and the 95th year.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk,
By F. B. VINOT,
Dy. Clerk.

Marshal's return.

Received Aug. 9th, 1871, by the U. S. marshal, and on the 12th day of same month and year served a copy of within citation and accompanying petition and supplemental petition on George C. Benham, named herein, by handing the same to Wm. C. Sanford, clerk of police-jury, at court-house, in the town of Lake Providence, Carroll Parish, the within-named George C. Benham being absent from the State.

New Orleans, August 16th, 1871.

(Signed) S. W. REED,
Dy. U. S. Marshal.

50 *Exceptions of the police-jury of Madison Parish.—(Filed Octo. 30th, 1871.)*

United States circuit court, district of Louisiana.

JAMES M. BARCLAY
vs.
THE BOARD OF LEVEE COMMISSIONERS AND the parishes of Madison and Carroll. } No. 6497.

And now, by their counsel undersigned, come the Police-Jury of the parish of Madison, made defendant in this cause, and for exception say:

That plaintiff's suit is not maintainable in this the honorable the circuit court of the United States for the district of Louisiana, on the following grounds:

1st. In that the order for removal of said cause from the thirteenth judicial district court of the State of Louisiana, in and for the parish of Carroll, was improvidently granted, was unauthorized by law, and was obtained informally and upon insufficient evidence.

2nd. In that the original petition of the plaintiff in said thir-
51 teenth judicial district court, in and for the parish of Carroll, avers that plaintiff resides in New Orleans, in the State of Louisiana.

3rd. In that the affidavit of said plaintiff, in the record of this suit contained, is not authenticated by any authority known to the laws of the United States.

Wherefore respondents pray that these exceptions be maintained, and that this cause be remanded to said thirteenth judicial district court of the State of Louisiana, in and for the parish of Carroll, at plaintiff's costs.

And in case the foregoing exceptions be overruled, and in that event only, then respondents, for further exception, say:

That plaintiff's suit is not maintainable in this the honorable the circuit court of the United States for the district of Louisiana, for that the petition of plaintiff herein filed is wanting in material and sufficient jurisdictional averments, such as are necessary in order to give this
52 honorable court jurisdiction of plaintiff's demand, in that the said petition shows that the plaintiff sues as assignee or endorsee of certain other persons therein named as prayees of certain warrants therein specified and described, but fails to allege said assignors or endorsors to be citizens of a different State, or of any State other than the State of Louisiana, in which this honorable court is held, and as such to be

entitled to maintain this action on said warrants in this court, the United States circuit court for the district of Louisiana.

Wherefore respondents pray that this exception be maintained, and this suit be dismissed at plaintiff's costs.

J. C. SEALE AND SAML. R. & C. L. WALKER,
Counsel for the Police-Jury of the Parish of Madison.

Exception of William Sutton.—Filed Novr. 20th, 1871.

JAMES M. BARCLAY
vs.
BOARD OF LEVEE COMMRS. ET ALS. } No. 6497.

53 In the circuit court of the United States for the fifth circuit and district of Louisiana.

Now into court comes William Sutton, and, reserving the right to answer hereto, pleads this his peremptory exception:

Shows that he is not president of the Board of Levee Commissioners in the levee-district in the parishes of Madison & Carroll, and was not president of said board at the time citation was served upon him in the above-entitled suit.

Shows that he is without interest in the subject-matter of this suit, and without right to stand in judgment.

Wherefore he prays to be hence dismissed with his costs.

(Signed) J. C. SEALE,
(") SAML. R. & C. P. WALKER,
(") J. EDWARDS LEONARD,
Attys.

54 *Exception and answer of parish of Carroll.—Filed Novr. 20, 1871.*

United States circuit court, fifth circuit and district of Louisiana.

JAMES M. BARCLAY
vs.
BOARD OF LEVEE COMMRS. } ✻ 6497.

Now into court comes the parish of Carroll, made party defendant in the above-entitled cause, and, reserving the right to answer hereto, pleads these its declinatory exceptions:

Excepts:

1st. That this honorable court is without jurisdiction of the above-entitled cause by reason of the insufficiency of plaintiff's averments, in that the said plaintiff does not state that the original holders of the alleged warrants upon which plaintiff's suit is based are aliens or citizens of other States than Louisiana, all of which must fully appear in order to give the Federal court jurisdiction of a suit brought by a third
55 holder or assignee upon any negotiable instrument or chose in action.

Excepts:

2°. That this honorable court is without jurisdiction of the above-entitled cause, because all the original holders of the alleged warrants upon which plaintiff's suit is based were, at the time said warrants purport upon their face to have been issued, and have ever been since that time, citizens of Louisiana, and therefore without right to bring suit against respondent upon said alleged warrants in the Fed'ral court, and that the subsequent transfer of said alleged warrants to a citizen of

another State cannot, by the act of Congress regulating the practice of the Federal courts, invest said courts with jurisdiction in the premises.

Wherefore this respondent prays that this suit be dismissed for want of jurisdiction of this honorable court, and that the parish of Carroll be allowed to depart hence with its costs.

56 And if these declinatory exceptions be overruled, and not otherwise, then this respondent excepts perem'torily, and answers that no judgment can be rendered against the parish of Carroll in these proceedings, because the said parish was not a party to the alleged contract upon plaintiff's suit is based, and has never become such by any subsequent act of its own; that, if the warrants described in plaintiff's petition were ever issued as alleged, they were the debts of another and entirely distinct corporation, for which this respondent is in no way responsible.

And this respondent, further answering, denies that the said warrants were ever issued by any competent authority; denies that the Board of Levee Commissioners, composed of the parishes of Carroll & Madison, described in plaintiff's petition, ever had any corporate existence under the laws of Louisiana; denies further, even if said corporation

57 did exist, that it had any right to issue the warrants upon which plaintiff's suit is based; denies that said corporation, if it ever existed, had any right to contract debts beyond the cases in which express permission was granted it by the legislature so to do; and that whereas no authority can be found in any of the statutes of this State for the issue of said alleged warrants, denies that the alleged board had any authority to bind the citizens or the lands of the parish of Carroll for the payment of its alleged obligations; that, if said obligations were ever contracted, they must be satisfied from the proceeds of the property of said board, and that the property of the parish of Carroll is in no way liable for the same.

And if these objections be not sustained, then this respondent pleads in bar of plaintiff's action the prescription of five years and pre-

58 scription generally.

Wherefore this respondent prays for judgment that plaintiff's demand be rejected, and that the parish of Carroll be hence dismissed, with its costs.

(Signed) SAML. R. & C. L. WALKER,
" J. EDWARDS LEONARD,
Attys. for the Parish of Carroll.

Motion and order, exceptions fixed.—Minutes Novr. 21st, 1871.

Circuit court of the United States, 5th circuit and district of Louisiana, Nov. term, 1871.

NEW ORLEANS, *Tuesday, Novr. 21st*, 1871.

Court met pursuant to adjournment. Present, the Hon. E. H. Durell, dist. judge.

JAMES M. BARKLEY
vs. } No. 6497.
BOARD OF LEVEE COMMRS. & AL.

On motion of J. C. Seale, esq., and Saml. R. & C. L. Walker, of counsel for the parishes of Madison, &c., defendant, it is ordered that the exception herein filed on part of said dfts. be fixed for trial on 28th instant, at 11 a. m., & that pltff. be notified thereof.

59 *Hearing and submission of exception of police-jury of parish of Madison.—Minutes Novr. 28th,* 1871.

JAMES M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. & AL. } No. 6497.

The exception filed by the police-jury of the parish of Madison was called up.

Thos. McCay & Race Foster and E. T. Merrick for plaintiff.

Saml. R. & C. L. Walker & J. Edwards Leonard for defendants.

T. Allen Clark appearing as amicus curia.

When, after hearing the pleadings & argument, the court took time to advise, and in the mean time allowed the plaintiff a reasonable time to procure the original affidavits of J. M. Barkley, on file in suit No. 5456 of the docket of the 15th judicial district court for the parish of Carroll.

Answer of Sutton to interrogatories on facts & articles.—(Filed Novr. 29th, 1871.)

JAMES M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. } No. 6497.

60 Before me, the undersigned authority, personally came and appeared William Sutton, late president of the Board of Levee Commissioners, and, in answer to plaintiff's interrogatories propounded in his amended petition, says:

1°. In answer to the first interrogatory: I cannot reccollect at this time whether I ever received the papers in question or not.

2°. In answer to the second interrogatory: I do not reccollect that I ever took the papers in question to a lawyer.

3°. In answer to the third interrogatory: I was elected president of the Board of Levee Commissioners of Madison & Carroll as early as the year 1859. I cannot tell what warrants I signed unless the same are exhibited to me. I have acted as president of the Board of Levee Commissioners since the passage of the act of the legislature approved March 28th, 1867. Dr. Samuel P. Bernard was treasurer and David L.
61 Morgan was secretary of said board at the meeting referred to in the interrogatory. My impression is that all the records of the Board of Levee Commissioners were destroyed by an overflow which occurred in the year 1867 or 1868.

(Signed) W. SUTTON.

Sworn to and subscribed before me this 14th day of October, A. D. 1871, as witness my hand and official seal.

[SEAL.] (Signed) C. A. DEFRANCE,
Parish Judge.

Exception & prayer for oyer.—(Filed March 13th, 1872.)

U. S. cir. court, dist. of La.

JAMES M. BARCLAY
vs.
BOARD OF LEVEE COMMRS., PARISHES OF Madison and Carroll, et als. } No. 6497.

And now by their counsel undersigned, come the police-jury of the parish of Madison, made defendant in this cause, and for exception

say that plaintiff's suit *suit* is not maintainable in this the hon-
62 orable the circuit court of the United States, on the following grounds:

1st. Because the order for removal of said cause from the thirteenth judicial dist. court for the parish of Carroll was improvidently granted, and was obtained informally and upon insufficient evidence.

2°. Because the original petition in said thirteenth judicial district court of Louisiana avers that the plaintiff resides in New Orleans, in the State of Louisiana.

3°. That the affidavit of said plaintiff in the record of said suit contained is not authenticated by any authority known to the laws of the United States.

Wherefore respondents pray that these exceptions be maintained, and that this suit be remanded to said thirteenth judicial district court for and in the parish of Carroll, at plaintiff's costs.

And should the foregoing exceptions be overruled, and in that event only, then respondents for further exception say that the said
63 plaintiff is not entitled to maintain this suit in this the honorable the circuit court of the United States for the district of Louisiana, for want of sufficient jurisdictional averments, this honorable court being without jurisdiction herein, for this:

That said petition shows that the said plaintiff sues as the assignee or endorsee of certain other persons therein named as being the payee of certain warrants therein named and described, but does not allege that said assigners or endorsers are citizens of a different State, or of any State other than the State of Louisiana in which this honorable court is held, and as such entitled to maintain this action on said warrants in this the honorable the circuit court of the United States; wherefore respondents pray that this exception be maintained and that this suit be dismissed at plaintiff's costs.

And should this exception be overruled, and in that event
64 only, then respondents pray oyer of each and every warrant in plaintiff's petition set forth and described, and that respondents be dispensed from further answer until said warrants shall have been produced and filed in court.

By J. C. SEALE, and
SAML. R. & C. L. WALKER,
Counsel for Madison Parish.

Answer of the police jury of the parish of Madison.—(*Filed March 13th*, 1872.)

U. S. circuit court.

JAMES M. BARCLAY
vs.
BOARD OF LEVEE COMMRS. ET AL. } No. 6497.

And should the exceptions hereinbefore filed be overruled, and in that case only, then this defendant, the police jury of the parish of Madison, for answer denies all and singular the allegations of plaintiff's petition, and prays that he be held to strict proof. This respondent especially denies that any such corporate body exists as the Board of Levee Commissioners of the parishes of Madison and Carroll, or
65 that if said corporation exists, respondent denies that William Sutton is president thereof, & that said corporation was in any manner authorized by law to issue warrants or letters of credit, or if

said corporation was so authorized by law, that said corporation could in any manner bind them, respondents, the parishes of Madison & Carroll; respondent further pleads the prescription of five years, and prays that plaintiff's demands be rejected with costs.

(Signed) J. C. SEALE.
" SAML. R. & C. L. WALKER.

Affidavit of A. J. Aiken.—(*Filed March 23d*, 1872.)

U. S. circuit court.

JAMES M. BARCLAY
vs.
THE BOARD OF LEVEE COMMISSIONERS LEVEE district for the parishes of Madison & Carroll, et al. } No. 6497.

Andrew J. Aiken, being duly sworn, on oath saith that he is acquainted with the plaintiff and has been acquainted with him for many
66 years, and that the said plaintiff is a citizen of the State of Tennessee; that said plaintiff has been for a period of more than fifteen (15) years up to the present time continuously a citizen of said State of Tennessee.

(Signed) ANDREW J. AIKEN.

Sworn to and subscribed before me this 14th day of March, 1872.

(Signed) F. A. WOOLFLEY,
U. S. Commr.

Hearing and order, continuance of exceptions.—*Minutes April 17th*, 1872.

JAMES M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. } No. 6497.

The exceptions in this cause were called.
Ths. McCay & E. T. Merrick for plff.
S. R. Walker & J. Edwards Leonard for exceptors.
When, after hearing the pleadings and argument, the same are continued till to-morrow at 11 a. m.

Hearing and submission of exceptions.—*Minutes April 18th*, 1872.

67 J. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. } No. 6497.

The exceptions herein were resumed, and, after hearing further argument, the court took time to advise, and allowed the atty. for the defendants a reasonable time to file a brief.

Note of evidence.—(*Filed April 18th*, 1872.)

U. S. circuit court, district of Louisiana.

J. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. } No. 6497.

Plaintiff offered document 10, on file in 6517.

Document No. 10.—(*Filed April* 18*th*, 1872.)

OFFICE OF BOARD OF LEVEE COMMISSIONERS,
Lake Providence, Septr. 13*th*, 1867.

The board met to-day at 6 o'clock p. m., pursuant to notice.
68 Present, Wm. Sutton, president; S. T. Chambless, Carroll; H. P. Morancy, T. C. Predford, John T. Cochrane, Madison.

The board was called to order by the president, when the question of the payment of the bondholders was taken under advisement.

The board, not being prepared for action, adjourned to 7 o'clock a. m. to-morrow, Septr. 14th, 1867.

(Signed) D. T. MORGAN,
Secy.

LAKE PROVIDENCE, *Sept.* 14*th*, 1867.

The board met to-day at 9 o'clock a. m., pursuant to adjournment.

Present—Same as yesterday.

On motion, the proposition of bondholders through Genl. Sparrow, as follows, to wit: That, after complying with the requirements of the act of the legislature approved March 28th, 1867, the bondholders will remit the payment of the coupons maturing in April, 1868, to April, 1870, and the coupons maturing in April, 1869, to April, 1871.

On being voted for the yeas & nays stood as follows:
69 Yeas: Wm. Sutton, S. T. Chambless, H. P. Morancy, T. C. Bedford—4.

Nays: J. T. Cochrane—1.

The following ordinances being offered, the yeas and nays were called for:

Resolved, That T. C. Bedford, H. P. Morancy, S. L. Chambless be appointed as a committee to confer with the holders of levee scrip of Carroll and Madison, with a view to the settlement thereof, and to advertise requesting the holders of scrip to advise the secretary of the board, D. L. Morgan, the amts. they respectively hold.

Carried.

Resolved, That prescription on the outstanding scrip shall not run on from this date until the first day of March next.

Carried.

Resolved, That the secretary proceed at once to prepare a statement showing the board necessary to be issued on the accrued inter-
70 est on unredeemed coupons, and other data necessary to the carrying out of the act of the legislature and ord'nance passed by the board this session.

Carried.

D. L. MORGAN,
Secretary.

Notice.

The board of levee commissioners of Carroll & Madison, with a view to the settlement of their outstanding liabilities, have appointed the undersigned members of the board a committee to confer with scrip-holders for the purpose of enabling the board to take prompt action in the premises.

We therefore solicit from scrip-holders or their agents such proposi-

tions as they may feel disposed to make, addressed to D. L. Morgan, secretary of the board, at Lake Providence.

(Signed) S. L. CAMBLESS.
T. C. BEDFORD.
H. P. MORANCY.

LAKE PROVIDENCE, *Sept.* 14, '67.

I certify the foregoing three pages contain a correct copy of the minutes & resolutions of the Board of Levee Commissioners of
71 Carroll and Madison for the dates herein set forth.

Done and signed this 31st day of January, 1872.

[SEAL.] (Signed) D. L. MORGAN,
Secty. Board Levee Commrs. for Carroll & Madison.

For identification with bill of exceptions.

(Signed) W. B. WOODS, *Judge.*

Filed June 20, 1874.

(Signed) F. A. WOOLFLEY, *Clerk.*

Order exception overruled.—Minutes April 30th, 1872.

J. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. } No. 6497.

Ordered, that the exception be overruled, with costs.

Order of 30th April, 1872, set aside and exception resubmitted.—Minutes May 2d, 1872.

J. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. & ALS. } No. 6497.

72 Upon the application of counsel for the defendants—

It is ordered that the decree made on the 30th of April, 1872, overruling the exception, be set aside, and that defendants have leave to submit briefs.

Motion and order for a delay to file brief.—Minutes May 3d, 1872.

J. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. } No. 6497.

On motion of S. R. Walker, esqr.,

Ordered, that he have a delay of 3 days to file a brief in this cause.

Judgment by default against the board of levee commissioners.—Minutes May 3d, 1872.

J. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. } No. 6497.

On motion of Thos. McCay & Race Foster & E. T. Merrick, of counsel for plff.,

It is ordered by the court that a judgment by default be rendered against the said board of levee commissioners.

73 *Order on exception.—Minutes May 8th, 1872.*

J. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. & AL. } No. 6497.

For reasons orally assigned, ordered, that the exceptions be reinstated and argued before Mr. Justice Bradley, who is expected to arrive here during the coming week.

Order, default stand reinstated.—Minutes May 14th, 1872.

U. S. circuit court, fifth circuit & district of Louisiana.—April term, 1872.

NEW ORLEANS, *Tuesday, May 14th*, 1872.

Court met pursuant to adjournment. Present, Hon. J. P. Bradley, associate justice of the Supreme Court, presiding; Hon. W. B. Woods, circuit judge.

JAS. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS., &C. } No. 6497.

On motion of T. McCay & Race Foster & E. T. Merrick, of counsel for plff., and it appearing to the court that a judgment by default was rendered against the Board of Levee Commissioners of the parishes of Madison & Carroll in this case, on the third day of May, instant, which may have been impaired by the reinstating of the exceptions of the police-juries of the said parishes of Madison & Carroll as to jurisdiction for further argument:

It is ordered by the court that said judgment by default stand and be reinstated against said Board of Levee Commissioners of said parish*ishes* of Madison & Carroll.

This reference approved.

F. A. WOOLFLEY, *Clerk.*

Motion & order.—Exceptions fixed for trial.

74 On motion of T. McCay & Race Foster & E. T. Merrick, of counsel for plff., it is ordered that the exceptions as to jurisdiction filed for the parishes of Madison & Carroll be assigned for trial for Friday, 17th inst., at 11 a. m.

Hearing & submission of exceptions.—Minutes May 17th, 1872.

J. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. } No. 6497.

The exceptions in this case came up. Race Foster & E. T. Merrick & Ths. McCay for complainants.

S. R. & C. L. Walker & J. E. Leonard for exceptors.

When, after hearing the pleadings & arguments, the court took time to consider.

Order.—Exceptions overruled.—Minutes May 20, 1872.

J. M. BARKLEY
vs.
BOARD OF LEVEE COMMRS. } No. 6497.

For reasons orally assigned, ordered that the exceptions be overruled, with costs.

75 *Judgment against the Board of Levee Commissioners, &c.—From Judgment Book, June 8th,* 1872.

Circuit court of the United States, fifth circuit and district of La.—April term, 1872.

NEW ORLEANS, *Saturday, June 8th,* 1872.

Court met pursuant to adjournment.

Present, Hon. E. H. Durell, district judge.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS OF THE Levee District composed of the parishes of Madison & Carroll. } 6497.

In this case, more than three judicial days having elapsed since the judgment by default was rendered, and the plaintiff having proven his demand against the said Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll—

It is ordered, adjudged, and decreed that said James M. Barkley do recover and have judgment against said Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll, a corporation, for the sum of one hundred thousand nine hundred
76 and ninety-two $\frac{53}{100}$ dollars, with 8% interest on the sum of $1,533.25 from May 5th, 1859; on $2,115.13 from 15th October, 1859; on $1,567 from 21st October, 1859; on $6,401 from 29th November, 1859; on $3,461.33 from December 10th, 1859; on $2,333 from 21st December, 1859; on $10,865.32 from 23d January, 1860; on $2,733 from 25th January, 1860; on $10,667 from 25th February, 1860; on $5,667 from 3rd March, 1860; on $122.51 from March 24th, 1860; on $3,733 from 26th March, 1860; on $5,600 from 28th March, 1860; on $1,000 from 30th March, 1860; on $2,000 from April 5th, 1860; on $3,362 from 16th April, 1860; on $869.73 from 1st May, 1860; on $5,767 from 12th May, 1860; on $7,284.27 from 16th May, 1860; on $546.70 from 26th May, 1860; on $363.38 from 12th May, 1860; on $19,769.91 from 15th October, 1860; on $2,131 from 12th November, 1860; on $800 from 12th December, 1860; on $300 from 29th May, 1861, till paid and costs of suit.

Judgment rendered June 8th, 1872.

Judgment signed June 13th, 1872.

(Signed) E. H. DURELL,
Judge.

77 *Writ of fieri facias.—Issued July 19th*, 1872.—*Returned and filed October 18th*, 1872.

Circuit court of the United States for the fifth circuit, holding sessions in and for the dist. of Louisiana.

The President of the United States to the marshal of the district of Louisiana or his lawful deputy, greeting:

You are hereby commanded that you demand from the Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll, the sum of one hundred thousand nine hundred and ninety-two $\frac{53}{100}$ dollars, with 8% interest on the sum of $1,533.25 from May 5th, 1859; on $2,115.13 from 15th October, 1859; on $1,567 from 21st October, 1859; on $6,401 from 29th November, 1859; on $3,461.33 from December 10th, 1859; on $2,333 from 21st December, 1859; on $10,865.32 from 23rd January, 1860; on $2,733 from 25th January, 1860; on $10,667 from 25th February, 1860; on $5,667 from 3d March, 1860; on $122.50 from March 24th, 1860; on $3,733 from 26th March, 1860; on $5,600 from 28th March, 1860; on $1,000 from 30th March, 1860; on
78 $2,000 from April 5th, 1860; on $3,362 from 16th April, 1860; on $869.73 from 1st May, 1860; on $5,767 from 12th May, 1860; on $7,284.27 from 16th May, 1860; on $546.70 from 26th May, 1860; on $363.38 from 12th May, 1860; on $19,669.91 from 15th October, 1860; on $2,131 from 12th November, 1860; on $800 from 12th December, 1860; on $300 from 29th May, 1861, till paid and costs of suit—clerk's costs, $51.60; atty.'s fee, $20, cash—and which James M. Barkley lately recovered by judgment of the circuit court of the United States for the 5th circuit and district of Louisiana; and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said Board of Levee Com-
79 missioners, &c., in your district, whereof they were owners on the 13th day of June, 1872, into whose hands soever the same may have come; and that you have those moneys before our said court to render to the said James M. Barkley for the judgment aforesaid on the 70th day from the date hereof, together with this writ.

Witness the honorable Salmon P. Chase, Chief.Justice of the Supreme Court of the United States of America this 18th day of July, A. D. 1872, and 97th year of the Independence of the United States.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

Marshal's return.

Received July 19th, 1872, by the U. S. marshal, and proceeded to Carroll Parish, State of La., for the purpose of making demand for the payment of the within writ from W. H. Sutton, president of the Board of Levee Commissioners of the levee district of the parishes of Carroll & Madison, but was unable to find him, and was informed that said Sutton was absent from the State. I then made demand of plaint-
80 iff's attorney to point out property of defendant to satisfy this writ, which he failed to do, and, being unable to find any prop-

erty of defendant upon which to levy, this writ is returned not executed.

(Signed) S. W. REED,
Dy. U. S. Marshal.

OCT. 18, '72.

Affidavits of James M. Barkley—Filed August 7th, 1872.

JAMES M. BARKLEY
vs.
BOARD LEVEE COMMRS. OF THE PARISHES of Madison & Carroll. } No. 6497.

Personally came and appeared before me, a United States commissioner, et cet., James M. Barkley, who, being duly sworn, deposes and says that he is the plaintiff in the before-named suit of James M. Barkley *vs.* The Board of Levee Commissioners of the parishes of Carroll and Madison, and numbered on the dockets of the district court of Carroll Parish, State of Louisiana, thirteenth judicial district, 5456.

That he made the above affidavit before John F. Gresham, clerk of the county court of Washington County, State of Tennessee, on
81 the 31st day of October, A. D. 1870; that all the facts and allegations therein stated are true and correct; that he was at the date of the original suit, on the 23rd day of Augst., 1867, for many years previous thereto, and continuously to the present time, a citizen of the State of Tennessee.

That he had, on the 31st day of October, 1870, and now has, good reason to believe, and does believe, that owing to prejudice and local influence he could not and will not be able to obtain justice in the said district court.

(Signed) JAMES M. BARKLEY.

Subscribed and sworn to before me Decr. 15th, 1871.

[SEAL.] (Signed) H. M. AIKEN,
U. S. Commr. District East Tenn.

STATE OF TENNESSEE,
County of Washington:

This day James M. Barkley personally appeared before the undersigned authority and made oath that, in a suit now pending in the district court of Carroll Parish, State of Louisiana, styled James M. Barkley vs. The Board of Levee Commissioners of the parishes of Car-
82 roll and Madison, in which affiant is plaintiff, and numbered on the docket of said court 5456, he has reason to believe, and does believe, that owing to prejudice and local influence he will not be able to obtain justice in said court.

(Signed) JAMES M. BARKLEY.

Sworn to and subscribed before me on this the 31st day of October, A. D. 1870.

[SEAL.] (Signed) JOHN F. GRESHAM,
Clerk County Court Washington Co., Tenn.

I certify that John F. Gresham, before whom the within affidavit was sworn to, is clerk of the county court of Washington County, Tennessee, and that full faith and credit is due to all his official acts.

Given under my hand this 1st day of November, 1870.

(Signed) G. W. TELFORD,
Chairman of the County Court of Washington County.

STATE OF TENNESSEE,
Washington County:

I, John F. Gresham, clerk of the county court of said county,
83 hereby certify that G. W. Telford, esq., is chief-justice or chairman of our county court, duly elected and qualified, and that all his official acts as such are entitled to full faith and credit.

Witness my hand and official seal of office at office in Jonesborough, this 2nd day of November, 1870.

(Signed) JOHN F. GRESHAM, *Clerk.*
[SEAL.]

I, T. H. Butler, secretary of state for the State of Tennessee, do hereby certify that John F. Graham, whose official signature is subscribed to the foregoing certificate, and whose seal of office as clerk, &c., is affixed thereto, was, at the time the same were so subscribed and affixed, a legally elected and qualified clerk of the county court for the county of Washington in said State of Tennessee, and that his official acts as such are entitled to full faith and credit.

In testimony whereof I have hereunto set my official signature; and by order of his excellency the governor affixed the great seal
84 of the State of Tennessee, at *at* the executive department, in Nashville, on the 31st day of Jany., 1872.

(Signed) T. H. BUTLER,
[SEAL.] *Secretary of State.*

Writ of alias fieri facias.—Issued Octo' 18th, 1872, *and returned and filed November 15th*, 1872.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMRS., &C. } No. 6497.

Circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana.

The President of the United States to the marshal of the district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded, as you have heretofore been, that you demand from the Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll the sum of one hundred thousand nine hundred and ninety-two $\frac{53}{100}$ dollars, with 8% interest on the sum of $1,533.25 from May 5th, 1859; on $2,115.13 from 15th October, 1859; on $1,567, from 21st October, 1859;
85 on $6,401, from 29th November, 1859; on $3,461.33, from December 10th, 1859; on $2,333, from 21st December, 1859; on $10,865.32, from 23rd January, 1860; on $2,733, from 25th January, 1860; on $10,667, from 25th February, 1860; on $5,667, from 3rd March, 1860; on $122.51 from March 24th, 1860; on $5,600, from 28th March, 1860; on $1,000, from 30th March, 1860; on $3,733, from 26th March, 1860; on $2,000, from April 5th, 1860; on $3,362, from 16th April, 1860; on $869.73, from 1st May, 1860; on $5,767, from 12th May, 1860; on $7,284.27, from 16th May, 1860; on $546.70, from 26th May, 1860; on $363.38, from 12th May, 1860; on $19,769.91, from 15th October, 1860; on $2,131, from 12th November, 1860; on $800, from 12th December, 1860; on $300, from 29th May, 1861; till paid & costs of suit—clerk's costs, $54.30; atty.'s fee, $20.00, cash—which James M. Barkley

lately recovered by judgment of the circuit court of the United States for the 5th circuit and district of Louisiana, and if the same be not paid on demand, that then you cause the same to be made out of
86 the personal estate of the said Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll, in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll, in your district, whereof they were owners on the 13th day of June, 1872, into whose hands soever the same may have come; and that you have those moneys before our said court to render to the said James M. Barkley, for the judgment aforesaid, on the 70th day from the date hereof, together with this writ.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this 18th day of October, A. D. 1872, and 97th year of the Independence of the United States.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk.

87 *Marshal's return.*

Received October 18th, 1872, by the U. S. marshal, and returned November 15th, 1872, by order of plaintiff's attorney, T. S. McCay.

(Signed) JOHN FAHY,
Dy. Marshal.

Nov. 15, '72.

Plurius fieri facias.—Issued November 15th, 1872.—Returned and filed April 12th, 1873.

JAS. M. BARKLEY
vs.
THE BOARD OF LEVEE COMMRS., &C. } No. 6497.

Circuit court of the United States for the fifth circuit, holding sessions in and for the district of La.

The President of the United States to the marshal of the district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded, as you have heretofore been, that you demand from the Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll the sum of one hundred thousand nine hundred and ninety-two $\frac{53}{100}$ dollars, with 8% interest on the sum of $1,533.25, from May 5th, 1859; on $2,115.13,
88 from 15th Octo'r, 1859; on $1,567.00, from 21st October, 1859; on $6,401.00, from 29th November, 1859; on $3,461.33, from December 10th, 1859; on $2,333.00, from 21st December, 1859; on $10,865.32, from 23d January, 1860; on $2,733.00, from 25th January, 1860; on $10,667.00, from 25th February, 1860; on $5,667.00, from 3rd March, 1860; on $122.51, from March 24th, 1860; on $3,733.00, from 26th March, 1860; on $5,600.00, from 28th March, 1860; on $1,000.00, from 30th March, 1860; on $2,000.00, from April 5th, 1860; on $3,362.00, from 16th April, 1860; on $869.75, from 1st May, 1860; on $5,767.00, from 12th May, 1860; on $7,284.27, from 16th May, 1860; on $546.70, from 26th May, 1860; on $363.38, from 12th May, 1860; on $19,769.91, from 15th October, 1860;

on $2,131.00, from 12th November, 1860; on $800.00, from 12th December, 1860; on $300.00, from 29th May, 1861, till paid, and costs of suit—clerk's costs, 57.00; atty.'s fee, $20.00, cash—which James M. Barkley lately recovered by jud'ment of the circuit court of the United States for the 5th circuit and district of Louisiana; and if the same be not paid on demand, that then you cause the same to be made
89 out of the personal of the said Board of Levee Commissioners for the levee district composed of the parishes of Madison and Carroll in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said Board of Levee Commissioners for the levee district composed of the parishes Madison & Carroll in your district, whereof they were owners on the 13th day of June, 1872, into whose hands soever the same may have come; and that you have those moneys before our said court, to render to the said James M. Barkley, for the judgment aforesaid, on the 70th day from the date hereof, together with this writ.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this 15th day of November, A. D. 1872, and 97th year of the Independence of the United States.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk.

Marshal's return.

Received November 16th, 1872, by the U. S. marshal, and re-
90 turned not executed; the president of the Board of Levee Commissioners for the district composed of the parishes of Carroll & Madison having died before service could be made on him to enforce the payment of the within judgment.

(Signed) T. W. DEKLYNE,
Deputy U. S. Marshal.

April 12th, 1873.

Motion & order.—Exceptions of parishes of Madison & Carroll fixed.—Minutes, February 17th, 1873.

Circuit court of the United States, fifth circuit & district of Louisiana.
November term, 1873.

NEW ORLEANS, *Monday, Febr'y 17th*, 1873.

Court met pursuant to adjournment.
Present: Hon. E. H. Durell, district judge.

JAS. M. BARKLEY
vs.
THE BOARD OF LEVEE COMM'RS, &C. } No. 6497.

On motion of Sam'l R. & C. L. Walker & I. E. Leonard, of counsel for defts., it is ordered that the peremptory exceptions filed on the part of the parishes of Madison & Carroll be fixed for trial on Friday, the 21st day of February, 1873, at 11 a. m., and that the complainant be notified thereof.

91 *Rule.—Entered & filed February 20th*, 1873.

U. S. circuit court.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET ALS. } No. 6497.

In this case, on motion of Thos. McCay and Race Foster and E. T. Merrick, of counsel for plaintiff, and on suggesting to the court that the matters pleaded as special exceptions in this case have been tried and overruled, and that the case stands upon an answer wherein are pleaded all other matters of defence as proper to be regularly tried upon the issue so made before the jury; and that the plaintiff is entitled to the usual delays to summon his witnesses, and that the order of court setting down portions of the answer as exceptions was improvidently obtained ex parte, it is ordered by the court that the defendants, the parishes of Carroll and Madison, show cause on the 21st inst., at 11 o'clock a. m., why said order should not be rescinded.

Marshal's return.

Received February 20th, 1873, by the U. S. marshal, and on
92 same day, month, and year served a copy of within rule on Samuel R. & C. L. Walker, named herein, by handing the same to C. L. Walker.

New Orleans, February 21st, 1873.

(Signed) S. W. REED,
Dy. U. S. Marshal.

Order, perem'tory exceptions overruled.—Minutes February 21, 1873.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET ALS. } No. 6497.

The exceptions filed by the parishes of Madison & Carroll came up for trial.

Race Foster & E. T. Merrick for plff; I. E. Leonard for exceptors.

When, after hearing the pleadings and argument, it was ordered that said peremptory exceptions be overruled with costs.

Amended answer.—Filed May 24th, 1873.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET AL. } No. 6497.

93 And now comes the police-jury of the parish of Madison, made defendant in this suit, and, the leave of the court being first had and obtained, files this its amended and supplemental answer and further defence to plaintiff's demand in his petition set forth; and says in addition to the averments in its original answer contained:

1st. That this respondent, the police-jury of Madison, is a municipal body of the State, *sperate* and distinct from any other corporation.

2nd. That if the said Board of Levee Commissioners for the levee dis-

trict in the parishes of Madison and Carroll be still in existence, that the said board is a corporation chartered by the laws of Louisiana, and is entirely seperate & distinct from this the police-jury of the parish of Madison.

3rd. That, if said Board of Levee Commissioners is a lawful body and lawfully executed the warrants sued on, this respondent is not in any manner or form connected with said contracts nor responsible in any way therefor.

94 4th. That if said Board of Levee Commissioners issued said pretended obligations, then this respondent avers the same to have been issued in contravention of the law of the State of Louisiana, and are illegal, null, and void, being issued in violation of law and contrary to public policy.

5th. That if the said writings legally issued that they are prescribed as appears by the date of the same respectively, and the date of service of citation on this respondent, apparent on the record, and therefore respondent pleads the prescription of five years and of ten years to plaintiff's action. And respondent prays for judgment in its favor, rejecting plaintiff's demand at plaintiff's costs, and for general relief.

(Signed) SAML. R. & C. L. WALKER,
Counsel for Respondents.

Order.

Let this amended answer be filed.
May 24th, 1873.
(Signed) E. H. DURELL,
Judge.

95 *Alias plurius fi. fa., issued Dec'r 4th*, 1873; *returned and filed January 12th*, 1874.

JAMES M. BARCLAY
vs.
THE BOARD OF LEVEE COMMISSIONERS, &C. } No. 6497.

Circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana.

The President of the United States to the marshal of the district of Louisiana, or his lawful deputy, greeting:

You are commanded, as you have heretofore been, that you demand from the Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll the sum of one hundred thousand nine hundred & ninety-two $\frac{53}{100}$ dollars, with interest on the sum of $1,533.25, from May 5th, 1859; on $2,115.13, from 15th October, 1859; on $1,567.00, from 21st October, 1859; on $6,401.00, from 29th November, 1859; on $3,461.33, from December 10th, 1859; on $2,333.00, from 21st December, 1859; on $10,865.32, from 23d January, 1860;

96 on $2,733.00, from 25 January, 1860; on $10,667.00, from 25th February, 1860; on $5,677.00, from 3rd March, 1860; on $122.51, from March 24th, 1860; on $3,733.00, from 26th March, 1860; on $5,600.00, from 28th March, 1860; on $1,000.00, from 30th March, 1860; on $2,000.00, from April 5th, 1860; on $3,362.00, from 16th April, 1860; on $869.75, from 1st May, 1860; on $5,767.00, from 12th May, 1860; on $7,284.27, from 16th May, 1860; on $546.70, from 26th May, 1860; on

$363.38, from 12th May, 1860; on $19,769.91, from 15th October, 1860; on $2,131.00, from 12th November, 1860; on $800.00, from 12th December, 1860; on $300.00, from 29th May, 1861, till paid, and costs of suit—clerk's costs, $70.60; atty.'s fee, $20.00, cash—which James M. Barkley lately recovered by judgment of the circuit court of the United States for the 5th circuit and district of Louisiana, and if the same be not paid on demand, that then you cause the same to be made out of
the personal estate of the said Board of Levee Commissioners for
97 the levee district composed of Madison & Carroll, in your district,
if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the Board of Levee Commissioners for the levee district composed of the parishes of Madison & Carroll, in your district, whereof they were owners on the 13th day of June, 1872, into whose hands soever the same may have come; and that you have those moneys before our said court, to render to the said James M. Barkley, for the judgment aforesaid, on the 70th day from the date hereof, together with this writ.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this 4th day of December, A. D. 1873, and 98th year of the Independence of the United States.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

98 *Notice of demand.—(Issued Dec'r 4th, 1873.)*

UNITED STATES MARSHAL'S OFFICE,
District of Louisiana:

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS, &C. } No. 6497.

To Dr. S. P. Bernard & David L. Morgan:

Amount of judgment $100,192.53, with interest as set forth in the writ issued herein, and all costs.

By virtue of a writ of fieri facias, issued and to me directed by the honorable the circuit court of the United States for the 5th circuit and district of Louisiana, I hereby notify you to pay into my hands the above amount of judgment, interests, & costs, or to point out property sufficient to satisfy the same, in default of which I shall proceed to seize and advertise for sale, according to law, any portion of defendant's property, real or personal, sufficient to satisfy said writ.

New Orleans, December 4th, 1873.

(Signed) JOHN FAHY,
Dep'ty U. S. Marshal..

99 *Marshal's return on notice of demand.*

Issued Dec'r 4th, 1873, by the U. S. marshal, and on the 10th day of December, 1873, served a copy hereof on Dr. S. P. Bernard & David L. Morgan, named herein, by handing the same to them in person at the town of Lake Providence, Carroll Parish, La., 477 miles from New Orleans.

New Orleans, Dec'r 15, 1873.

Attest: JOHN FAHY,
D'y Marshal.

Marshal's return on fi. fa.

Received December 4th, 1873, and on the 10th of December, 1873, I served the annexed notice, demanding payment, on Dr. S. P. Bernard and David L. Morgan, as secretary & treasurer of the Board of Levee Commissioners of the parishes of Carroll & Madison, and I demanded them to point out property sufficient to satisfy this writ, and they failed to point out property, the said Bernard and Morgan being the only surviving officers or members of said Board of Levee Commissioners, as far as I am able to learn.

100 I then demanded of plaintiff's attorneys to point out property, and they answered that they were unable to do so, and knowing no property of the defendant myself, this writ is returned not satisfied.

(Signed) C. R. STEELE,
D'y U. S. Marshal.

January 12th, 1874.

Perem'tory exception of police jury of Madison Parish.—(Filed January 12th, 1874.

United States circuit court, district of Louisiana.

J. M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS, &C. } No. 6497.

And now comes the police jury of the parish of Madison, made defendants in this suit, and plead this perem'tory exception founded in law, to wit, that there is no ground or cause of action alleged or set forth in the plaintiff's petition as to this defendant, the parish of Madison. Wherefore they pray that plaintiff's suit as to this defendant be dismissed with costs.

(Signed) SAM'L R. & C. L. WALKER,
& J. C. SEALE,
Atteys. of Parish of Madison.

101 *Peremptory exception of Carroll Parish.—(Filed January 12th, 1874.)*

U. S. circuit court, district of Louisiana.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS & AL. } No. 6497.

And now comes the police jury of the parish of Carroll, made defendant in the above-styled suit, and plead this peremptory exception founded in law, that there is no cause or ground of action set forth or alleged in plaintiff's petition as to this defendant. Wherefore he prays that plaintiff's suit as to this defendant be dismissed, with costs.

(Signed) SAML. R. & C. L. WALKER,
" I. EDWARD LEONARD,
Attys. of Parish of Carroll.

Motion & order, exception fixed.—Minutes of January 12th, 1874.

U. S. circuit court.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET ALS. } No. 6497.

On motion of Saml. & C. L. Walker, of counsel, it is ordered that
102 the perem'tory exception herein filed by the police jury of Madison Parish and by the police jury of Carroll Parish be fixed for trial on Wednesday, the 14th day of January, 1874, and that plaintiff's counsel, Messrs. Race Foster & E. T. Merrick and T. S. McCay, esq., be duly notified.

Petition of J. M. Barkley.—(Filed January 24th, 1874.)

Circuit court of the United States, fifth circuit and dist. of Louisiana.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS FOR the Parishes of Madison and Carroll. } No. 6497.

To the hon. the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of James M. Barkley, a citizen of the State of Tennessee, respectfully represents that, on or about the 23rd day of August, 1867, petitioner instituted a suit in the district court of the thirteenth judicial district of the State of Louisiana, holding sessions in & for the parish of Carroll, State of Louisiana, being cause numbered on the
103 docket of the last-mentioned court as cause No. 5456, against the Board of Levee Commissioners for the parishes of Carroll and Madison, under the name and style of Board of Levee Commissioners of Carroll & Madison, the same being a corporation existing by virtue of the laws of the State of Louisiana, and being a citizen of the State of Louisiana, for divers large sums of money due upon levee-warrants or levee-scrip, being evidences of debt for work and labor done upon the levees in said parishes of Madison and Carroll, to protect the inhabitants of said parishes and all property therein from inundation and overflow; and for the payment of which said evidences of debt the laws of Louisiana had provided the assessment, collection of taxes and liens and privileges upon all taxable in the aforesaid parishes of Madison and Carroll; said evidence of debt being in due form and of various dates, and having various acknowledgments thereon, as more at large set forth in the petitions in said suit, to which, and to the warrants them-
104 selves on file, reference is made for greater certainty.

Petitioner further represents that, having good reasons therefor, he removed said cause into this, the circuit court of the United States for the fifth circuit and district of Louisiana, and caused the police-juries of the parishes of Madison and Carroll, the same being citizens of the State of Louisiana, to be made parties to the said suit, the same being the cause first aforesaid, and to which this proceeding is auxcillary, and which said suit is made a part hereof, for greater certainty and to correct any errors in the description of the causes of action and the proceedings had in the said suit.

Petitioner further represents that such proceedings were had in said suit—William Sutton being president of said Board of Levee Commissioners—that, on the nineteenth day of June, A. D. 1872, a final judgment was signed against said Board of Levee Commissioners for Carroll and Madison upon said evidences of debt for said work and labor done upon said levees in the said parishes
105 for the sum of one hundred thousand nine hundred and ninety-two $\frac{53}{100}$ dollars, bearing interest at the rate of eight per cent. per annum on the sum of $1,533.25, from the fifth day of May, 1859; on $2,115.13, from October 15th, 1859; on $1,567, from October 21st, 1859; on $6,401, from November 29th, 1859; on $3,461.33, from December 10th, 1859; on $10,865.32, from January 23d, 1860; on $2,733, from January 25th, 1860; on $10,687.00, from February 25th, 1860; on $5,669.00, from March 3rd, 1860; on $122.50, from March 24th, 1860; on $3,733.00, from March 26th, 1860; on $5,600.00, from March 28th, 1860; on $1,000.00, from March 30th, 1860; on $2,000.00, from April 5th, 1860; on $3,362.00, from April 16th, 1860; on $869.73, from May 1st, 1860; on $5,767.00, from May 12th, 1860; on $7,284.27, from May 15th, 1860; on $546.70, from May 26th, 1860; on $363.38, from May 12th, 1860; on $19,769.00, from October 15th, 1860; on $2,131.00, from November 12th, 1860; on $800.00, from November 12th, 1860; on $300.00, from May 9th, 1861; all of which will more fully and at large appear by reference
106 to the said judgment, a copy of which is annexed.

Petitioner further represents that said Board of Levee Commissioners, after having acted under prior statutes, was created and made a corporation by the act of the legislature of the State of Louisiana, approved the 10th day of March, A. D. 1859, and the members of said board were made elective, as previously they had been by the act of legislature of said State of Louisiana, *were* approved the twenty-fifth of March, A. D. 1853.

Petitioner further represents that although by the act of the legislature of the State of Louisiana, approved March 13th, A. D. 1861, power to assess and collect any more taxes, except such levee-tax as might be necessary to meet the indebtedness of said Board of Levee Commissioners, and although each of said parishes was made a seperate levee district (having the police-juries of the respective parishes, with the usual corporate powers of police-juries) by two acts of the said legislature, approved March 15th, 1861, and the 16th of March, 1861,
107 the said legislature by one act approved March 28th, A. D. 1867, among other things continued the Board of Levee Commissioners of Carroll and Madison in office, without any further dim*uni*tion of their powers, with power to fill vacancies until their successors should be elected and qualified, but that the constitution of Louisiana in 1868 excepting said last-mentioned act from ratification, petitioner avers that said provision in the said constitution, so far as the same operated upon the contracts under which your petitioner had brought suit, was void, as impairing the obligation of contracts, and in contravention of the Constitution of the United States.

Petitioner further represents at the time of the institution of the said suit the Board of Levee Commissioners consisted of the following-named persons, viz: William Sutton, president, and Samuel P. Chambless, levee commissioner of Carroll Parish, and H. P. Morancy, Thos. C. Bedford, and John T. Cochrane, of Madison Parish, but now, recently
108 by death and otherwise, the only remaining members of said board consist of said H. P. Morancy, Thos. C. Bedford, and John F. Cochrane; that petitioner is informed that said Morancy resides in

said parish of Madison, that said Bedford resides principally at the city of Vicksburg, Mississippi, but claims domicil at his plantation in Louisiana in said parish of Madison, and that said Cochrane has been a part of the time, since the institution of this suit, a resident of the State of Mississippi, but has returned as aforesaid to the parish of Madison, State of Louisiana.

Petitioner further represents that he is advised that no election of levee commissioners for said levee district has been held at the general elections since, and the said levee board has failed to fill vacancies.

Petitioner further represents that he has caused executions to issue on his said judgment against said Board of Levee Commissioners in vain, and among others a plurius fi. fa. was issued on the fourth day of December, A. D. 1873, under which the marshal of this district demanded of
Dr. S. P. Bernard and David L. Morgan, secretary and treasurer
109 of the Board of Levee Commissioners, they being the only surviving officers of said Board of Levee Commissioners, to point out property to satisfy said writ, and they failed to point out any, and after proper demands made on plaintiff's attorneys, the said marshal, being unable to find property, returned said fi. fa. unsatisfied, and it is now since the death of the president, Wm. Sutton, pretended by said surviving officers, as well as by said police-juries of said parishes of Madison & Carroll, that said Board of Levee Commissioners is dissolved by various acts of the legislature and by the constitution of Louisiana of 1868, and by the death and resignation of the members of the board, and that there is no one *one* to answer for said Board of Levee Commissioners, and they also unjustly pretend that there is no power to enforce said judgment in favor of your petitioner.

Petitioner further represents that on or about the first day of December, A. D. 1870, while the said suit was pending in the said State court, the said police-jury of the parish of Madison filed their petition
110 of intervention in said suit, wherein they alleged, among other things, "That the parties really interested as defendants (meaning defendants in said suit) are the parishes of Carroll and Madison; that should judgment be rendered in favor of said plaintiff, (meaning petitioner,) the execution thereof would be enforced against the property of the citizens of said parishes, and that they are the real parties in interest, and that your petitioners, as the representatives of the parish of Madison, have a large pecuniary interest in the result of this suit.

"They therefore pray to be allowed to file this their petition of intervention and to join the defendants in resisting plaintiff's demand."

Petitioner further represents that by the various repeals of the general statutes on the subject of the levees, the police-juries of the respective parishes become seized of the jurisdiction over the territory of their respective parishes, and should the death of William Sutton, since the *the* rendition of said judgment, and the death of Samuel P. Cham-
111 bless prevent the said Board of Levee Commissioners from acting as a board, then it is the duty of the police-juries of the respective parishes of Carroll and Madison, exercising like jurisdiction over the same territory, to assess, in proportion to the taxable property of the two parishes, as returned to the State auditor, and collect sufficient taxes on the property subject to a levy tax to pay the said judgment, interest and costs, to petitioner.

Petitioner further represents that he is advised that he cannot be deprived of his rights by the division of said acts of 1861, nor by the repeal (if such it be) of the act of 1867, nor by the failure to elect

members of the Board of Levee Commissioners, nor by the death or resignation of the officers of said Board of Levee Commissioners, but that the law will furnish him adequate relief by the writ of mandamus, so that there shall be no failure of justice, and that if it shall appear that neither the said Board of Levee Commissioners nor the said police-juries can assess and collect the said tax, that then this hon. court will direct the marshal of the United States, as is provided
112 in analogous cases in the State courts, to assess and collect the tax upon the taxable property in the said parishes of Carroll and Madison to pay said levee-warrants on judgments, interest and costs.

Wherefore, petitioner prays that a writ of mandamus may issue in this cause, after cause shown, against such of the Board of Levee Commissioners aforesaid as now survive, to proceed and to assess and collect a tax for the payment of petitioner's said judgment, or in the event the court should be of the opinion that the survivors have not such power, and cannot fill vacancies in their body, then that the police-juries of said parishes of Carroll & Madison perform that duty, and assess and collect sufficient tax to pay said judgment; or if the court shall be of the opinion that it has not power to make either of said orders, then that this hon. court do order the United States marshal of this district, in person or through some competent deputy, to assess at once or by installments, from year to year, if it be deemed advisable, and collect sufficient taxes upon the property subject to taxation for levee purposes in
113 said parishes to pay said judgment debt, interest and costs, and for general relief in the premises, and that this court direct how the service hereof shall be made.

(Signed) T. S. McCAY, *Atty.*, &
" RACE FOSTER & E. T. MERRICK,
Also Attys. for Petitioner.

DISTRICT OF LOUISIANA,
City of New Orleans:

Personally came and appeared before me, the undersigned, United States commissioner, Thomas S. McCay, an attorney at law, who, being duly sworn, deposes and says that he is the attorney of James M. Barkley, a citizen of the State of Tennessee, & who is now absent from the State of Louisiana; deponent further says all the facts & allegations in the foregoing petition are true and correct, as he verily believes.

(Signed) T. S. McCAY.

Sworn to & subscribed before me on this 24th day of January, A. D. 1874.

[SEAL.] (Signed) J. G. EUSTIS,
U. S. Commissioner.

114 *Nota.*

The copy of judgment referred to in the foregoing petition as being annexed is already copied, and will be found on page of this transcript.

Rule.—Extract from the minutes January 24th, 1874.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET AL. } No. 6497.

On consideration of the petition and affidavit in this case, it is ordered by the court that the said surviving members of said Board of Levee

Commissioners and the police-juries of the parishes of Madison and Carroll do show cause on Monday, the sixteenth day of February next, at 11 o'clock a. m., before this court, at the city of New Orleans, why a mandamus should not issue, as prayed for in the said petition, and such other order be made as right may require, in order to prevent a failure of justice. And it is further ordered that this order and plaint-
115 iff's said petition for a mandamus be served upon the president of the said police-juries of said parishes of Madison & Carroll, and upon H. P. Morancy, Thomas C. Bedford, and John T. Cochran, of the said parish of Madison, or such of them as can be found.

Marshal's return.

Received January 27th, 1874, by the U. S. marshal, and on the 28th day of January, 1874, served a copy hereof, with a petition for a mandamus accompanying, on Thomas C. Bedford, named herein, by handing the same to him in person in the town of De Soto, parish of Madison, 412 miles from New Orleans, and on the 29th of January, 1874, served a copy hereof, with petition for a *a* mandamus accompanying same, on John Cochran, herein named, by handing the same to him in person in the parish of Madison, 415 miles from New Orleans, and on the 28th day of January, 1874, served a copy hereof, with petition for a mandamus accompanying same, on the president of the police-jury of Madison, by handing them to A. V. Brown, the president of said jury, in person,
116 at the town of Delta, parish of Madison, La., 400 miles from New Orleans, and on the 30th day of January, 1874, served a copy hereof, with petition for a mandamus accompanying same, on the president of the police-jury, parish of Carroll, by handing them to Chs. J. Nash, the president of said jury, in person, in the town of Lake Providence, 477 miles from New Orleans; H. P. Morancy served personally, on the 31st, with a copy hereof, & petition for a mandamus accompanying same, (Febry. 2d, 1874,) in person, at Mil'iken's Bend, 425 miles from New Orleans.

(Signed) J. L. CONLON,
Dy. Marshal.

Exception and answer to the rule.—Filed Febry. 16th, 1874.

Circuit court of the United States, district of Louisiana.

THE UNITED STATES OF AMERICA, ON THE relation of James M. Barkley, *vs.* THE BOARD OF LEVEE COMMISSIONERS ET al. } No. 6497.

And now comes H. P. Morancy, Thos. C. Bedford, and John T.
117 Cochran, made defendants in this proceeding, and for causes why the writ of mandamus should not issue, do respectfully show—

First. That this hon. the circuit court is without authority in law to issue the writ of mandamus prayed for.

Second. That the said corporation is defunct or suspended, by resignation of the president and of your respondents, and by the death of William Sutton, late president of said corporation, before service of this rule *nisi*.

Third. That your respondents are incompetent to represent said corporation, because there is not a quorum thereof remaining, and the survivors are all citizens of the parish of Madison, whose terms of office expired by law on Novr. 1st, 1862.

Fourth. That they were disfranchised and rendered ineligible to hold such office by the act of the Congress of the United States, approved March 2d, 1867, entitled "An act to provide for the better government of the rebel States," and by the act of said Congress supple-
118 mentary to the act aforesaid, approved March 27th, 1867, and by act approved July 19, 1867, supplementary to the two acts first mentioned, and defining the meaning and intent of same.

Fifth. That these respondents are incompetent to represent said corporation, having been disqualified, made ineligible to said officers, by the 99th article of the constitution of the State of Louisiana, adopted March the 7th, 1868, and their offices vacated by the act of the *act of the* legislature of Louisiana, being act No. 39, of the year 1868, your respondents having given aid and comfort and having held office for twelve months under the association known as the Confederate States of America; wherefore respondents pray that the prayer of be rejected and this rule dismissed at his cost.

And should the above grounds be deemed *by* insufficient cause why the writ prayed for should not issue, then these respondents further show—

First. That this hon. circuit court is without jurisdiction, because the record of suit No. 5456, from the 13th judicial district court
119 of Louisiana, for the parish of Carroll, from whence it was removed to this court, and numbered 6497 on the docket thereof, contains nor exhibits any evidence of the citation of William Sutton, alleged therein to be president of the said corporation; that there was no appearance on the part of the said corporation, defendant in said suit, nor issue joined on the part of the court below or in this hon. court, and that all the proceedings in this suit are *coram non judice* and are null and void;

Second. That the judgment in the suit rendered and attempted to be enforced by mandamus is absolutely null and void, having been rendered without citation; and

Third. Because said judgment is rendered on obligations which are void, and which were issued by said board or its officers without authority and in contravention of law; and

Fourth. Because the said pretended warrants, or scrip, is prescribed by the prescription of five years.

(Signed) J. C. SEALE,
(") SAML. R. & C. L. WALKER,
(") J. E. LEONARD,
Atty. for H. P. Morancy, T. C. Bedford, & J. T. Cochran.

120 *Exception of police-jury, Madison Parish.*—(*Filed February 16th*, 1874.)

In the circuit court of the United States, district of Louisiana.

THE UNITED STATES OF AMERICA, ON THE relation of James M. Barkley, *vs.* THE BOARD OF LEVEE COMMISSIONERS et al. } No. 6497.

An' now comes Alexander B. Brown, president of the police-jury of the parish of Madison, and, for exception and cause to plaintiff's demand and rule herein filed, respectfully shows—

That there is a suit pending between the same parties, for the same

object, and growing out of the same cause of action, before this court, which suit is yet not decided; wherefore respondent pleads lis pendens, and prays this rule be dismissed at mover's costs. And should this plea be overruled, and in that case, your respondent shows that the police-jury of the parish of Madison is another and different political corporation from the Board of Levee Commissioners, having no
121 powers except those specified by law and specially granted to them for especial purposes in the manner and form set forth in the law, and that they are not vested with power to assess and collect any tax to pay the debts of the Board of Levee Commissioners, or any other corporation than their own, contracted according to law; wherefore they pray to be dismissed hence with costs.

(Signed) J. C. SEALE,
(") SAML. R. & C. L. WALKER,
Attys. for the Police-Jury of Madison.

Note of evidence on trial of rule for mandamus.—(*Filed February* 16, 1874.)

U. S. circuit court.

JAMES M. BARKLEY
vs.
BOARD OF LEVEE COMMISSIONERS. } No. 6497.

Note of evidence taken on the trial of rule of 24th January, 1874, for a mandamus February 16th, 1874.

Plaintiff offers in evidence the entire record and proceedings in this suit, No. 6497, in this court. Objected to by defendants.

Also, the certificates or warrants sued on.

Objected to by defendants and sustained by the court, to which
122 ruling plaintiff reserved a bill of exceptions.

A. H. Arthur sworn for plaintiff, but not examined.

Plaintiff also offered in evidence certificate of auditor and reports, (but not furnished.)

After argument, the further hearing is continued to Monday, 23d inst.

Hearing and continuance of rule.—(*Minutes February* 16, 1874.)

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET AL. } No. 6497.

The application for a mandamus in this case came up.

Thos. McCay & Race Foster & E. T. Merrick for plaintiff in rule.

Samuel R. & C. L. Walker for defendants in rule.

And, after hearing the pleadings, evidence, and arguments, the same is continued till Monday, 23d instant, at 11 a. m.

Order.—Continuance of application for a mandamus.—(*Minutes of February* 23*d*, 1874.)

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMRS. ET AL. } No. 6497.

123 For want of time, it is ordered that the application for a mandamus be continued till Friday, 17th March, 1874, at 11 a. m.

Testimony of A. H. Arthur.—Filed March 26th, 1874.

U. S. circuit court.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS. } No. 6497.

Alexander H. Arthur, a witness for the plaintiff, being first duly sworn, on oath, saith that he resides in the city of Vicksburg, Miss. Has resided there for many years. It is directly opposite the parish of Madison, and for many years a large business was and is done in Vicksburg with the parishes of Madison and Carroll. During the time the levees were being built by the Levee Board, say in the years A. D. 1858, 1859, & 1860, I was often in the parish of Madison and several times in the parish of Carroll, and saw several of levees whilst being built, and knew many of the contractors personally.

124 Among the levee-warrants on file in this case, (or in the hands of the clerk,) I recognize warrants in favor of the following-named contractors on the works of the levees: John Fennimore, William Biggs, Foulkes & McCluskey, Benjamin Foulkes, who was also of said firm, B. F. Wharton, Temple S. Coons, Zeigler Marcy & Co., John Killeen, T. C. Bedford, John N. Nalley, Patrick Bradley, Mellen, of Mellen & McGill, Joshua James, E. B. Towne, L. E. Love, Robert Ramsey.

I recognize these warrants now before me as being in the form in use by the Board of Levee Commissioners at the dates of said warrants. I recognize the signature of Wm. Sutton, the president of the Board of Levee Commissioners, on said warrants, (with the exception of two warrants which were signed by Abraham Bass whilst he was president of the board.) I recognize the signatures of Chas. R. Purdy, secretary of the Board of Levee Commissioners, on all the warrants except one, and that is signed by J. C. Elliot, whose signature I do not know. The signature of S. P. Bernard, treasurer of said board, is genuine on such

125 warrants as purport to have the signature on them. A. W. Green was also treasurer at one time, and I recognize his signature on all of said warrants which purport to have his signature on the same as treasurer. The signature of Bass, president, is also genuine. The signature of J. Fennimore, or John Fennimore, is the genuine signature of John Fennimore on all the warrants now before me which purport to be signed by him. The signature' also of B. Foulkes, and Foulkes & McCluskey, are genuine. The signature of John H. Nalley is also genuine; so are that of F. C. Bedford, John Killeen, Zeigler Marcy & Co., signed by Zeigler, William Biggs, Mellen & McGill, written, I think, by Mellen, Joshua James, E. B. Towne, R. Ramsey, B. T. Wharton, & Temple S. Coons, wherever their names purport to be written on said warrants.

To obtain these warrants the contractor obtained a certificate from the engineer that he had done a certain amount of work on the levees.

126 He took the certificate to the president and secretary, and they gave him a warrant on the treasurer for the amount he was entitled to receive. Until he completed the contract, a reservation was made which was deducted. When the work was done the full amount was paid.

Cross-examined:

Not acquainted with plaintiff; became acquainted with the history of

these warrants by being cashier in banking-house of Brown & Johnson in Vicksburg, Miss. Shepherd Brown & Joseph H. Johnson composed the house. I recognize among these warrants about thirty warrants in the name of William Biggs, John Fennimore, J. H. Smith, L. E. Love, and Joshua James, in amount about 49,000, as per list annexed, marked "H," as having been formerly the property of Brown & Johnson.

List A.

Recognized several in packages in the name of William Biggs, viz:

No. 1819, for	1,000 00	No. 1934, for	1,000 00
1580, "	1,000 00	" 1932,	1,000 00
1505, "	1,066 67	" 1996,	1,000 00
1581, "	1,461 33	" 1995,	1,000 00
1933, "	1,000 00	" 1935,	733 00
		" 1936,	1,867 00
	5,528 00		6,600 00
			5,528 00
			$12,128 00

127 John Fennimore:

No. 1821, for	$3,300 00	No. 1718, for	1,000 00
No. 1813, "	1,000 00	" 1720, "	1,000 00
No. 1495, "	5,333 33	" 195, "	1,000 00
No. 1949, "	1,000 00	" 1401, "	1,000 00
No. 1854, "	1,000 00	" 181, "	1,000 00
No. 1815, "	1,000 00	" 1820, "	1,667 00
No. 1959, "	1,600 00	" 173, "	733 00
No. 1814, "	1,000 00	" 1956, "	1,000 00
	15,233 33		8,400 00
			15,233 33
			$23,733 33

Joshua James, No. 1422, $1,567.
J. E. Love, No. 1173, $1,533.25.
J. H. Smith, No. 1930, $122.51.

W. Biggs	$12,128
Jno. Fennimore	23,733 33
J. James	1,567 00
J. E. Love	1,533 25
J. H. Smith	122 51
Total	$49,084 09

I know these warrants to have belonged to Brown & Johnson about May, 1862; think that the Biggs & Fennimore warrants very near at par. Messrs. Brown & Johnson were interested in having the levees built, having plantation-grounds behind them. Had no
128 interest in these warrants himself. Mr. Johnson died, I understood, in Virginia in 1863. Brown has lived in New Orleans since 1853, and perhaps longer. I have taken two of these warrants since the war. I do not consider them of any value; they were not saleable in 1865.

Re-examined:

Mr. Brown belonged to two companies in New Orleans, first Cuddy, Brown & Co. and then Rotchford, Brown & Co. They also had a banking-house in New Orleans, called Brown, Johnson & Co., beside the cotton-house. I have never commenced suit on my two levee-warrants; was told they were barred by prescription. The levees built by the Levee Board were very substantial levees, and planters advanced money to contractors to facilitate the building, and received levee-warrants in many instances in payment. That was the case with the Biggs and Fennimore warrants.

(Signed) A. H. ARTHUR.

Sworn to and subscribed before me, at the city of New Orleans, this 24th day of February, A. D. 1874.

(Signed) ALFRED INGRAHAM,
Commr. of the U. S.

129 It is agreed that the witness may be sworn before any judge, notary, commissioner, or justice of the peace, and all objections are reserved except as to the form and manner of taking the testimony.

(Signed) RACE FOSTER & E. T. MERRICK,
J. McCAY,
SAML. R. & C. L. WALKER,
J. C. SEALE,
J. E. LEONARD,
Attys. for Madison & Carroll Police-Juries.

Hearing & submission of application for a mandamus.—Minutes March 26, 1874.

Circuit court of the United States, fifth circuit & district of Louisiana. November term, 1873.

N. O., *Thursday, March 26th*, 1874.

Court met pursuant to adjournment.
Present, the Hon. W. B. Woods, circuit judge.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET AL. } No. 6497.

The application for a mandamus was called up.

130 T. McCay & Race Foster & E. T. Merrick for applicant.
Saml. R. & C. L. Walker for defendant.

When, after hearing argument, the court took time to advise, and allowed the parties until the end of this term to furnish briefs.

Decree from judgment-book.—April 4th, 1874.

Circuit court of the United States for the fifth circuit & district of Louisiana, November term.

NEW ORLEANS, *April 4th*, 1874.

Court met pursuant to adjournment.
Present, the Hon. W. B. Woods, circuit judge.
" " Hon. E. H. Durell, district judge.

JAMES M. BARCLAY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET AL. } No. 6497.

In this case the law and the evidence being in favor of relator, on the application for a writ of mandamus, it is ordered, adjudged, and decreed

by the court that after the first day of December, A. D. 1874, the marshal of this court do proceed to levy, assess, and collect the levee-tax authorized by the act of the legislature of the State of Louisiana ap-
131 proved March 18th, A. D. 1858, entitled "An act to amend an act entitled 'An act to amend an act forming a levee-district, to be composed of the parishes of Carroll, Madison, and Catahoula, and for the better protection of the same from inundation,'" to wit, ten cents on each and every acre of alluvial lands situated in the base of the hills west of Bayou Macon and the levees on the Mississippi River in the parish of Carroll, and between the levees on the Mississippi River and the western boundary, in the parish of Madison, and three hundred per cent. on the State and mill tax on all property assessed by the State of Louisiana in said levee-district, except lands, the same being an annual ad-valorem tax, as authorized by said statute, to pay the judgment for debt, interest, & *and* cost in this case, as prayed for in said petition for a mandamus; and in the event said taxes, when so collected by the said marshal, shall be insufficient to pay the said judgment, debt, interest, & cost, it is further ordered, adjudged, and decreed that said marshal shall
132 proceed to assess and collect the same amount of taxes during the succeeding year, and so from year to year until said judgment for debt, interest, & cost is paid: Provided, That if the voters of said parishes of Madison and Carroll shall elect a board of levee commissioners, and the same shall qualify, organize, and diligently proceed to collect the said levee-taxes for the payment of the said judgment, or the police-juries of said parishes of Madison & Carroll shall take adequate means to pay off the said judgment, or if it shall appear that there is an immediate prospect that a tax will be levied and collected to pay the said judgment by said board of levee commissioners, on a proper showing of such action of said new board of levee commissioners so to be elected, or of the action of said police-juries, be made to this court, then the right is hereby reserved to further postpone this order.

Judgment rendered April 4th, 1874.

Judgment signed April 4th, 1874.

(Signed) W. B. WOODS, *Judge.*

133 *Rule for a new trial.*—(*Entered & filed April 4th*, 1874.)

U. S. cir. court.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET ALS. } No. 6497.

On motion of C. L. Walker, of counsel for the Police-Jury of the parish of Madison, for the Police-Jury of Carroll Parish and the respondents, and on suggesting to the court that there is error to their prejudice in the judgment rendered this fourth day of April, 1874, in the above-entitled cause:

It is ordered that the plaintiff, through his counsel, do show cause, on the 29th day of May, 1874, at 11 a. m., why a new trial should not be granted herein.

Marshal's return.

Received April 6th, 1874, by the U. S. marshal, and on same day, month, & year served a copy of within motion on Race, Foster & E.

T. Merrick, named herein, by handing the same to G. W. Race, a member of said firm.

134 New Orleans, April 16, 1874.

(Signed) S. W. REED,
Dy. U. S. Marshal.

Hearing & order.—Continuance of rule.—Minutes June 9th, 1874.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS. } No. 6497.

The rule for a new trial was called.
S. R. & C. L. Walker for relator.
Race, Foster & E. T. Merrick for dfts. in rule.
When, after hearing argument, the rule is continued till to-morrow at 11 a. m.

Hearing & submission of rule.—Minutes June 10, 1874.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS. } No. 6497.

The rule for a new trial was resumed, & after hearing further argument the court took time to advise.

135 *Order.—New trial granted on the application for a mandamus.—Minutes of June 20th, 1874.*

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET AL. } No. 6497.

For reasons orally assigned, it is ordered by the court that a new trial be granted on the application for a mandamus in this case.

Decree on the application for a mandamus from judgment-book.—June 20th, 1874.

Circuit court of the United States, fifth circuit & district of Louisiana, April term, A. D. 1874.

NEW ORLEANS, *June 20th*, 1874.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.
" Hon. E. H. Durell, district judge.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS, &C. } No. 6497.

On the petition for a mandamus and issues thereon, this cause
136 again coming on for trial on the petition of the plaintiff for

a mandamus and issues thereon, was submitted to the court; and, thereupon, on consideration thereof and considering the law and the evidence being in favor of the respondents, and for reasons orally assigned,

It is ordered, adjudged, and decreed by the court that the said petition for a mandamus be refused, and that there be judgment thereon against the plaintiff and in favor of respondents; and that the plaintiff pay the costs made on said proceeding for a mandamus.

Judgment rendered June 20th, 1874.

Judgment signed June 20th, 1874.

(Signed) W. B. WOODS,
Judge.

Bill of exceptions, No. 1.—(*Filed June* 20*th*, 1874.)

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS ET AL. } No. 6497.

Be it remembered that on the trial of the issue upon the petition for a mandamus, the plaintiff, after having offered in evidence with
137 the record the levee-warrants sued on in the original suit, offered to prove, by Alexander H. Arthur, a witness on the stand, and other witnesses, that the said warrants sued on were in the form adopted and used by the Board of Levee Commissioners, and were issued from time to time as the work upon the levees in the levee-district was performed; that the payees of said warrants who had indorsed the same were all contractors for the building of the levees in said district composed of said parishes of Madison & Carroll, and had performed a large amount of work thereon.

To the introduction of the said testimony, counsel for defendants in rule objected;

1st. On the part of Morancy, Bedford, and Cochrane, that the warrants originally sued on are merged in the judgment set up.

2d. On the part of the police-juries of Madison and Carroll Parishes, that the testimony offered as to them res inter alias acta and irrelevant, and that plaintiff could not go behind his own judgment.

And the court being of the opinion that said objections to said
138 testimony was well taken, excluded said testimony, and the plaintiff, by counsel, excepted, and tendered to the court this his bill of exceptions for signature and allowance, which is done.

(Signed) W. B. WOODS, [SEAL.]
Judge.

Bill of exceptions, No. 2.—(*Filed June* 20*th*, 1874.)

U. S. circuit court.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS, &C. } No. 6497.

On the application for a mandamus, & issues thereon.

Be it remembered that, on this 20th day of June, A. D. 1874, this cause having again come on for trial on the issues on the application

for a mandamus, upon the record of the original cause, the proceedings of record therein, the final judgment, the executions and marshal's returns thereon, the original levee warrants sued on, two of which are hereto annexed as specimens and examples of the others, and identified herewith by my signature, and the proceedings of the said Board of Levee Commissioners under the dates of September 13th & 14th,
139 1867, shown by and known as Document No. 10, and pages 81 and 97 of the State auditor's official report for A. D. 1873, and the statement of the said auditor, marked B, B, all of which being received in evidence, are herewith *are* identified by my signature, and made a part hereof; and no other evidence having been adduced, the plaintiff, by counsel, requested the court to adopt the following rulings for the decision of the cause, (viz:)

"1st. That this cause standing upon the record and judgment, execution, and returns, the obligations sued on used on the trial, and offered in evidence on this proceeding, and the proceedings of the said Board of Levee Commissioners on the 13 & 14th days of September, A. D. 1867, also offered in evidence on the former trials, marked "10," and now again offered in evidence, and no proof having been offered by the defendants, the judgment in this case cannot be contested in this proceeding by said levee commissioners Morancy, Bedford, and Cochrane, and must he held as valid.

"2nd. And for the same reason said judgement is not open to
140 objection by the said police-juries of the parishes of Madison & Carroll.

"3rd. That said Morancy, Bedford, and Cochrane, as surviving members of said Board of Levee Commissioners, have power to fill vacancies, and under the authority of the court to levy, assess, and collect the levee-taxes annually authorized by the laws in force at the time said obligations were issued in said levee-district until the said judgment shall be paid.

"4th. That in the event of inability on the part of the said Levee Board to levy and assess and collect the said taxes, the said police-juries succeeding to the powers of the said Levee Board, and exercising like jurisdiction over the same territory, have the power under the authority of this court to assess, levy, and collect the said levee taxes for the payment of the said judgment, in accordance with the said laws & the laws in pari materia.

"5th. That the plaintiff is entitled to a perem'tory mandamus to cause the levy, assessment, and collection of the said levee-taxes to be made to satisfy and pay the said judgment.

141 "6th. That the plaintiff is entitled to the remedy of a mandamus, directed to the marshal of the United States for the district of Louisiana, after a reasonable delay to be fixed by the court, to assess and levy & collect said levee-taxes *per*scribed by the laws in force in 1859 and 1860, for the assessment and collection of said levee-taxes in the levee-district composed of said parishes of Madison & Carroll in the years 1859, 1860, unless said levee commissioners, H. P. Morancy, Thos. C. Bedford, and John P. Cochrane, shall, either with or without a full board, to be elected by themselves, proceed to assess, levy, and collect said levee-taxes, or the same shall be done within the same time by the police-juries of the said parishes of Madison and Carroll, and that the said taxes, when collected by said marshal*l*, or said Board of Levee Commissioners, or said police-juries, as the case may be, shall be paid upon said judgment from time to time, and if need be from year to year, as fast as collected, until the said judgment is satisfied."

And thereupon, the court having adopted in substance the first two propositions aforesaid, declined to adopt the propositions num-
142 bered three, four, five, and six, requested as aforesaid by plaintiff's counsel, but on the contrary the court ruled, ex propio mo*tre*, advers'ly, as follows, (viz:)

That since the death of William Sutton, the president of said Board of Levee Commissioners, said defendants in this proceeding, Honore P. Morancy, Thomas C. Bedford, and John T. Cochrane, are the only surviving members of said Board of Levee Commissioners, and they all reside in the parish of Madison; that the law requires the like number to be appointed or elected for the parish of Carroll, and since the death of said Sutton, said parish of Carroll is without any representative on said board; that the three survivors above named do not constitute a quorum or majority and therefore *one* incapable of filling vacancies in said board and incapable of assessing the levee-taxes for the payment of the said judgment of the plaintiffs, and that there is no law which would authorize the police-juries of the said parishes of Madison and Carroll to assess or collect in their respective parishes a tax for
143 the payment of said judgment, and that the court is without authority to appoint the marshal of the United States for this district to exercise the duties and discretion which were vested by law in the board of levee commissioners, and that there being no person who can assess said levee-tax this application for a mandamus must be dismissed."

And thereupon the plaintiff, by counsel, excepted to the rulings of the court ex proprio motu aforesaid, and to the refusal of the court to adopt for the decision of the cause the said third, fourth, fifth, and sixth propositions above set forth, and tendered to the court this his bill of exceptions for signature and allowance, which is done.

(Signed) W. B. WOODS, [SEAL.]
Judge.

Warrant mentioned in bill of exception.—Filed June 20th, 1874.

JAMES M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS. } No. 6497.

$1,333.00. PROVIDENCE, LA., *Dec. 21st*, 1859.

144 At sight, the treasurer of the board of levee commissioners of Carroll and Madison is hereby authorized & required to pay to the order of John Fenimore the sum of thirteen hundred and thirty-three $\frac{00}{100}$ dollars.

[Warrant.]

W. SUTTON,
President Board of Commissrs.

CHAS. R. PURDY,
Secretary Board of Commissrs.

No. 1603.

(Written across the face:) Seal.
(Written on the margin:) Levee commissioners.
(Endorsed on back:) John Fenimore.
For identification with bill of exception.
(Signed) W. B. WOODS, *Judge.*

Warrant mentioned in bill of exception.—Filed June 20th, 1874.

JAMES M. BARKLEY
vs.
BOARD OF LEVEE COMMISSIONERS ET AL. } No. 6497.

$1,000.00. PROVIDENCE, LA., *May* 1, 1860.

On October 15th, 1860, the treasurer of the board of levee commissioners of Carroll and Madison is hereby authorized and required to pay to the order of J. H. Smith the sum of one thousand $\frac{00}{100}$ dollars, with 8% int. from date.

[Warrant.]

W. SUTTON,
President Board Commissrs.

CHAS. R. PURDY,
Secretary Board of Commissrs.

No. 2035.

(Written across the face:) Seal.
(Written on the margin:) Levee commissioners.
145 (Warrant endorsed on back:) J. H. Smith.
For identification with bill of exceptions.
(Signed) W. B. WOODS, *Judge.*

Auditor's report, from printed book, page 81.—*Filed June 20th*, 1870.

JAMES M. BARKLEY
vs.
BOARD OF LEVEE COMMISSIONERS. } No. 6497.

PARISH OF CARROLL, 1872.

Value of real estate of residents		1,158,620 00
Value of real estate of non-residents		483,275 00
Value of horses, mares, geldings, mules, etc		339,220 00
Value of carriages and other vehicles		36,085 00
Value of money loaned on interest or in possession		200 00
Value of capital invested or employed each year in trade, etc		85,800 00
Total value of property		$2,103,200 00

Amount of tax of four (4) mills on the dollar, for the support of the State government, as follows:

Tax on real estate of residents	4,634 48	
Tax on real estate of non-residents	1,933 10	
Tax on horses, mares, geldings, mules, etc	1,356 88	
Tax on carriages and other vehicles	144 34	
Tax on money loaned on interest or in possession	80	
Tax on capital invested or employed each year in trade	343 20	
		8,412 80
146 School-tax, for support of free public schools	4,206 40	

Interest-tax on all State bonds:		
Interest-tax, to pay interest on State bonds ...	13,670 80	
Levee-tax, to pay interest on levee-bonds	3,154 80	
Special levee-tax, to pay interest on levee-bonds.	5,258 00	
Levee-construction and levee-repair tax, 4 mills.	8,412 80	
		34,702 80
Total amount of taxes.....		$43,115 60

For identification with bill of exception.
(Signed) W. B. WOODS, *Judge.*

Auditor's report, from printed book, page 97.—*Filed June 20th*, 1874.

JAMES M. BARKLEY
vs.
BOARD OF LEVEE COMMISSRS. } No. 6497.

PARISH OF MADISON, 1872.

Value of real estate of residents.....	$1,198,870 00
Value of real estate of non-residents	1,154,850 00
Value of horses, mares, geldings, mules, etc	259,470 00
Value of carriages and other vehicles.....	32,900 00
Value of stock or interest in steamboats, ships, etc	1,500 00
Value of money loaned on interest or in possession	2,600 09
Value of capital invested or employed each year in trade, etc.....	48,970 00
Value of amount of household goods	500 00
Total value of property	$2,699,660 00

Amount of tax of four (4) mills on the dollar, for the support of the State government, as follows:

147	Tax on real estate of residents.....	4,795 48	
	Tax on real estate of non-residents.....	4,619 40	
	Tax on horses, mares, geldings, mules, etc.....	1,037 88	
	Tax on carriages & other vehicles	131 60	
	Tax on stock or interest in steamboats, ships, etc.	6 00	
	Tax on money loaned on interest or in possession.....	10 40	
	Tax on capital invested or employed each year in trade, etc	195 88	
	Tax on amount of household goods, etc	2 00	
			$10,798 64
	School-tax for support of free public schools....	5,399 32	
	Interest-tax on all State bonds:		
	Interest-tax to pay interest on State bonds....	17,547 79	
	Levee-tax to pay interest on levee-bonds	4,049 49	
	Special levee-tax to pay interest on levee-bonds.	6,749 15	
	Levee construction & levee repairs	10,798 64	
			$44,544 39
			55,343 03

For identification with the bill of exception.
(Signed) W. B. WOODS, *Judge.*

Auditor's statement, marked "B B."—Filed June 20th, 1874.

J. M. BARKLEY
vs.
BOARD OF LEVEE COMMISSRS. } No. 6497.

STATE OF LOUISIANA,
Auditor Office:

NEW ORLEANS, *May 20th*, 1873.

Value of taxable property in the parishes of Carroll & Madison for the year 1872:

148

CARROLL.

Value of real estate of residents	$1,158,620 00
Value of real estate of non-residents	483,275 00
" " horses, mares, geldings, mules, etc	339,220 00
" " carriages & other vehicles	36,085 00
" " money loaned on interest or in possession	200 00
" " capital invested or employed each year in trade	85,800 00
	2,103,200 00

MADISON.

Value of real estate of residents	$1,198,870 00
" " " " non-residents	1,154,850 00
" " horses, mares, geldings, mules, etc	259,470 00
" " carriages and other vehicles	32,900 00
" " stock or int. in st'boats, ships, etc	1,500 00
" " money loaned on int. or in possession	2,600 00
" " capital invested or employed each year in trade, etc	48,970 00
" " am't of household goods	500 00
	$2,699,660 00

I, Chas. Clinton, auditor of the State of Louisiana, do hereby certify that the foregoing are true extracts of the auditor's official report, required by law, for the year A. D. 1872, and that the same are true copies of the summary of the returns of the taxable property of said
149 parishes of Madison & Carroll, as appears on pages 81 & 97 of the aforesaid report.

In testimony whereof I have hereunto affixed my official seal and signature, the 21st day of May, A. D. 1873.

(Signed) CHARLES CLINTON, [SEAL.]
Auditor.

For identification with bill of exceptions.
(Signed) W. B. WOODS, *Judge.*

Nota.

Document No. 10, mentioned in bill of exception, is already copied and will be found on page 67 of this transcript.

Petition for writ of error and order allowing the same.—Filed September 23rd, 1874.

To the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States:

The petition of James M. Barkley, a citizen of the State of Tennessee, respectfully represent' that, having obtained, on or about the 13th
150 day of June, 1872, in the circuit court of the United States for the district of Louisiana, a judgment against the board of levee commissioners for the parishes of Carroll & Madison, a corporation and citizen of the State of Louisiana, and having issued executions thereon in vain, he, your petitioner, filed in the same court an application for a mandamus, and made Honore P. Morancy, Thomas C. Bedford, and John T. Cochrane, the surviving members of the said board of levee commissioners, parties to said rule by service on each of them under the order of the circuit court, and also made the police-juries of the said parishes of Madison & Carroll, corporations and citizens of the State of Louisiana, parties; that after signing bills of exception, the said court, on or about the 20th day of June, 1874, rendered and signed a final judgment against petitioner on his application for a mandamus and in favor of the said respondents, which will more fully appear by a copy thereof annexed for reference.

151 Petitioner also annexes a copy of his said bill of exception, which show' what legal questions were thereby raised.

Petitioner further represents that he feels aggrieved by the said final judgment on said petition for a mandamus rendered against him, and is advised that the same is erroneous.

Petitioner tenders his bond with Andrew J. Aiken, as surety for a writ of error in this case.

Wherefore petitioner prays that said bond may be approved, that a writ of error may be allowed, and that your honor will sign the needful citations in error in said case, and that said writ be made returnable on the second Monday of October, A. D. 1874, and for general relief.

(Signed) By THOS. McCAY,
RACE FOSTER, and
E. T. MERRICK,
Attys. for Petitioner.

Order.

The foregoing petition is allowed; let a writ of error be issued as prayed.

(Signed) JOSEPH P. BRADLEY,
Asso. Justice of the Sup. Court U. S.

Septr. 14th, 1874.

152 *Bond for writ of error.—Filed Septr. 23d, 1874.*

JAMES M. BARKLEY, PLAINTIFF IN ERROR,
vs.
BOARD OF LEVEE COMMRS. ET AL. } No. 6497.

Know all men by these presents that we, James M. Barkley, as principal, and Andrew J. Aiken, of New Orleans, as surety, are held and firmly bound unto the board of levee commissioners of the parishes of Madison and Carroll, Honore P. Morancy, Thos. C. Bedford, John T.

Cochrane, surviving members of said board, and the police-juries of the parishes of Madison & Carroll, respectively, in the full and just sum of five hundred dollars, to be paid to the said board of levee commissioners, Morancy, Bedford, & Cochrane, and said police juries, their certain attorney, executors administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed
153 with our seals, and dated this third day of August, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas, lately at a circuit court of the United States, fifth judicial district, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein said James M. Barkley is plaintiff and said board levee commissioners defendant, in a proceeding for a mandamus against said obligees, judgment was rendered against the said James M. Barkley on his said application, and the said James M. Barkley, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said board of levee commissioners, Morancy, Bedford, & Cochrane, surviving members, and said police-juries, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

154 Now, the conditions of the above obligation is such, that if the said James M. Barkley shall prosecute his writ to effect, and answer all cost if he fail to make his plea good, then the above obligation to be void; else remain in full force and virtue.

(Signed) JAMES M. BARKLEY, [L. S.]
Per RACE FOSTER & E. T. MERRICK.
(Signed) ANDREW J. AIKEN. [L. S.]

Sealed and delivered in the presence of—
N. J. ARMSTRONG.
WM. ARMSTRONG.

Andrew J. Aiken, being first duly sworn, on oath saith that his residence is in the city of New Orleans, and that he is worth (over and above all his debts & liabilities) more than five hundred dollars, the sum for which he has become security in the within bond.

(Signed) ANDREW J. AIKEN.

Subscribed & sworn to before me on this 3d August, A. D. 1874.
[SEAL.] F. G. EUSTIS,
U. S. Commissioner.

The foregoing bond is approved Sept'r 14th, 1874.
(Signed) JOS. P. BRADLEY,
Asso. Justice of the Sup. Ct. U. S.

155 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 154 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evi-

dence adduced on the trial of the case of James M. Barkley vs. The Board of Levee Commissioners of the parishes of Madison & Carroll et al., No. 6497 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 24th day of September, A. D. 1874.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 24th day of September, A. D. 1874.

E. H. DURELL, *Judge.*

156 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between James M. Barkley and the Board of Levee Commissioners of the parishes of Madison & Carroll, represented by Honoré P. Morancy, Thomas C. Bedford, and John T. Cochrane, surviving members of said Board of Levee Commissioners, said Honoré P. Morancy, Thomas C. Bedford, and John T. Cochrane, as surviving members of the said Board of Levee Commissioners, the police-jury of the parish of Madison and the police-jury of the parish of Carroll, in the State of Louisiana, a manifest error hath happened, to the great damage of the said James M. Barkley, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 23d day of September, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6497. James M. Barkley, plaintiff in error, versus Board of Levee Commissioners of the parishes of Madison & Carroll et al., defendants in error. Writ of error. Filed September 23d, 1874. F. B. Vinot, dy. clk.

157 THE UNITED STATES OF AMERICA, *ss:*

To the Board of Levee Commissioners of the parishes of Madison and Carroll, represented by Honoré P. Morancy, Thomas C. Be'ford, and John T. Cochrane, surviving members of said Board of Levee Commissioners; to said Honoré P. Morancy, Thomas C. Bedford, and John T. Cochrane, as surviving members of said Board of Levee Commissioners; to the police-jury of the parish of Madison, and to the police-jury of Carroll, in the State of Louisiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein James M. Barkley plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said James M. Barkley, plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 14th day of September, in the year of our Lord one thousand eight hundred and seventy-four.

JOSEPH P. BRADLEY,
Associate Justice.

158 On this 24th day of September, 1874, personally came and appeared before me the subscriber, S. W. Reed, a deputy marshal for the district of Louisiana, who, being duly sworn, declared that on this day he served copies of the within citation on the Board of Levee Commissioners of the parishes of Madison & Carroll, the police-jury of the parish of Madison, and the police-jury of the parish of Carroll, as stated in his official return hereon.

S. W. REED,
Dy. U. S. Marshal.

Sworn to and subscribed before me.

F. B. VINOT,
U. S. Commr.

(Indorsed:) United States circuit court. No. 6497. James M. Barkley, plaintiff in error, vs. Board of Levee Commissioners of the parishes of Madison & Carroll et al., defendants in error. Citation.

Marshal's return.

Received Sep. 23, 1874, by the U. S. marshal, and, on the 24th day of September, 1874, served copies of this citation on the Board of Levee Commissioners of the parishes of Madison and Carroll, and the police-juries of said parishes of Carroll and Madison, by handing the same to Saml. R. Walker, a member of the law firm of Saml. R. and C. L. Walker, the attorneys of record in this case for defendants in error, the Board of Levee Commissioners et al.

N. O., Sept. 24, 1874.

S. W. REED,
Dy. U. S. Marshal.

159 Supreme Court of the United States.

JAS. M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS, &C. } No. 278.

And now come the police-jury of the parish of Madison and the police-jury of the parish of Carroll, by their counsel, hereunder signed, into court, and say that there is no error to the prejudice of the plaintiff, either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid; and they pray that the said Supreme Court of judicature, before the justices thereof, now here, may proceed to examine, as well the record and proceedings aforesaid as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

SAML. R. & C. L. WALKER,
Attys. for the Police-Juries of the Parishes of Madison and Carroll.

(Indorsed:) Sup. Court U. S., 1875. Octo. term. No. 278. James M. Barkley vs. Levee-Commissioners Madison & Carroll. Joinder in error. Filed 11th August, 1875.

160 Supreme Court of the United States.

JAS. M. BARKLEY
vs.
THE BOARD OF LEVEE COMMISSIONERS. } No. 278.

And now comes Honoré P. Morancy, Thomas C. Bedford, and John T. Cochrane into court, by their counsel, here undersigned, and say:

That there is no error to the prejudice of plaintiff, either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid, and they pray that the said Supreme Court of judicature, before the justices thereof, now here, may proceed to examine, as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

SAML. R. & C. L. WALKER,
Attorneys for Morancy, Bedford, and Cochrane.

(Indorsed:) Sup. Court U. S., 1875. October term. No. 278. James M. Barkley vs. Board Levee Commrs. Madison & Carroll. Joinder in error. Filed 11th August, 1875.

(Indorsement on cover:) No. 278. James M. Barkley, plaintiff in error, vs. The Board of Levee Commissioners of the parishes of Madison and Carroll. Louisiana C. C. U. S. Filed 30th September, 1874.

INDEX.

Abstract of Pleadings 14–23
Assignment of Errors 28–31
Argument 31
Bills of Exception.....24, 28
Judgment: Effect of Original 66–67
Mandamus: Extent of Remedy in Louisiana, and Articles Code of Practice 71–72
Petition for Mandamus 18–21
Police Jury: Power of.....13, 66–67
Do. Succession of.....60–67
Power of Court.....44–46
Statutes..... 5–13
Do. of 1853, granting power to remainder of Commissioners to fill vacancies.....49–53
Do. of 1858, imposing assessment of ten cents an acre 7–8
Do. of 1861, designating the debt a parish debt 11

Supreme Court of the United States.

JAMES M. BARKLEY, PLAINTIFF IN ERROR,

versus

BOARD OF LEVEE COMMISSIONERS ET. AL.,

DEFENDANTS IN ERROR.

BRIEF AND ASSIGNMENT OF ERRORS FOR PLAINTIFF IN ERROR

The proceeding which has given occasion to the writ of error in this case, is an application to the Circuit Court of the United States for the District of Louisiana, for a mandamus to enforce a final judgment.

Not only the Board of Levee Commissioners for the parishes of Madison and Carroll, but also the Police Juries of said parishes, now exercising the same jurisdiction as to the levees, and over the same territory, are made defendants.

A judgment had been obtained in the same court against the same Board of Levee Commissioners, for the parishes of Madison and Carroll, for a fraction over $100,000 and interest, on certain obligations called "Levee Warrants." Record, page 28.

The forms of these warrants are shown on pages 52 and 53. They were signed by W. Sutton, the President of the Board, on whom service of process was subsequently made, and Chas. R. Purdy, Secretary, and had the corporation seal stamped across the face of each. The warrants on which the suit was brought were given to contractors for work done upon the levees and lines of embankment built to prevent the overflow of the alluvial lands of the Mississippi river.

This is the first time the *warrants* on the Levee Board have come before this court for adjudication, although a case irregularly brought on some bonds in the first instance on the equity side of the court, was brought up on appeal. The statutes and authorities cited in that case, would be but a partial and imperfect argument for this suit, and we hope that it will not be permitted to prevent a full consideration of the statutes on which this case is based. The proceedings in this case are not complained of by our adversaries as being irregular in form, and the warrants sued on are conceded to have been legal.

As we maintain that the present case differs from any others of the levee cases brought before this court, we may perhaps best bring it to the attention of the court by a reference to the locality where the levees are built, and the nature of the case, before giving extracts from the pleadings.

The two parishes of Madison and Carroll lie upon the Mississippi river on its right bank, immediately

below the Arkansas line, and form a part of the alluvial basin bounded by the Mississippi on the east, Bayou Macon hills and the Ouachita on the west, and Red river on the south.

Until about the year 1848, the whole of this now productive portion of the State, having been more recently settled, and many of the lands bought of the United States, was subject to overflow, and the residence of the people and means of subsistence; held at the mercy of an unstable river, became precarious. The malaria following overflows, at short intervals, poisoned the air, and the people were afflicted with epidemics, which if it did not rob them of life, left them with shattered and enervated constitutions. Lands in all this region were, at that time, of little or no value; as a consequence, abont 1848, the people of the district began to apply to the Legislature for more perfect relief and security than the system then in force gave them.

A system of levees for the protection of life and property in the district was resolved upon. But it was deemed of so much importance to the public welfare, that the system should be properly carried into effect as designed, that the size and structure of the levees were not trusted to the tax-payers, but to other bodies of men, whose duties were prescribed by law. Tensas and Concordia parishes were each a district by themselves. And Carroll and Madison were, with Catahoula, formed into one district, and a Board of Levee Commis-

sioners was appointed as the agents of the people therein. Lands lying on the bank of the river or on a bayou were inundated to a less degree than were those more remote, so that some plantations of thousands of acres in the highest cultivation, after the levees were built, would have been ten or fifteen feet under water, were it not for their protection. Lands that were without value without the levees, with them, produced a bale or a bale and a half of cotton to the acre, and this region became the richest cotton region in the world.

The levees gave the most of the lands *all the value they had.* The building of a levee around the protected territory, was just as valuable and added as much wealth to the owner of the estate as the most costly building or machinery which could be built upon it. It was money laid out and expended for the place itself. The Board of Levee Commissioners were therefore simply the agents of the people, and were appointed to raise the money and plan and build the levees for the increaseof their estates, *and their protection,* on the safest and best plan.

The Board of Levee Commissioners, therefore, became THE AGENTS OF THE LAND OWNERS to do for them, and at their common expense, what the proprietors had been previously obliged to do in an imperfect manner as individuals. And as the lands were to be benefitted, so the specific tax of ten cents an acre was, as a genral thing, to be collected out of the land. As the owners of the land were most immediately benefited

by the works erected to protect their lands, the assessment was sometimes wholly, and sometimes with a small personal tax, levied upon the lands.

It is known to the Court, that by the general laws the *Police Juries* were authorized to compel the riparian proprietors to build their levees. Police Jury vs. Britton, 15 Wall. 568.

They were intrusted with power to levy taxes as they might judge necessary to defray the expenses of their several parishes. Ibid.

In 1850, the Legislature conferred on the *Police Jury* of Carroll the "full power to lay and collect, as other taxes, such taxes as may be necessary for the purpose of making and keeping in repair levees in said parish; provided, that said tax shall be levied upon *such property and persons as may be protected and benefited* by said levees; and provided further, that such taxes shall never exceed the State tax in amount." Acts 1850, page 75, Act No. 107.

In 1852, a *Levee District* was, as already intimated, formed, composed of the *three* parishes, Carroll, Madison and Catahoula, and a Board of Levee Commissioners created, with power to fill vacancies. The act is composed of twenty-seven sections, and as it was greatly modified by subsequent acts, it will not be necessary to burden this brief with extended quotations from it.

It will be referred to when needed as explanatory of subsequent acts. It is found in the Acts of the Legislature of Louisiana of 1852, pages 234 to 238, Act

No. 330. It levied an ad valorem tax of one and a half per cent. on all alluvial lands protected by the levies to be built; (sec. 2, page 234;) and the Board of Commissioners were not created a body corporate.

In 1853, the levees of these two parishes were still objects of solicitude, and the Legislature, by the act of 25th March, 1853, amended, among other things, the act of 1852, so as to read as follows:

"That for the purpose of building or making and repairing all levees in said levee district, an annual tax of three hundred per cent. on the State and mill tax in the parishes of Madison and Carroll and one hundred and fifty per cent. in the parish of Catahoula, according to the State assessment roll of each year, beginning with the assessment roll of 1852, be and the same is hereby levied." See Acts 1853, page 44, sec 2.

The Commissioners were made elective, and styled a "Board of Levee Commissioners," (sec. 4,) with power to fill vacancies, and to continue in office until their successors are elected and qualified. This amendatory act contains nineteen sections. Acts 1853, pages 44–46.

Up to this time, the taxes for levees were collected by the sheriffs of the respective parishes.

In 1857, the Legislature conferred the right on the Board of Levee Commissioners to appoint a "Levee tax collector" for each of said parishes of Madison and Carroll. Page 35, Acts 1857.

The act prescribed the bond to be given by the tax

collectors, and conferred power on the Board of Levee Commissioners to fix compensation of the tax collectors and to settle with them. Acts 1857, page 35.

Another act was passed the same year, 1857, re-enacting and amending the second section of the act of 1853, so as to read as follows: "that for the purpose of making or building and repairing all levees in said Levee District, the Commissioners of the same are hereby authorized and empowered to assess an annual tax on all alluvial lands situated in the parishes of Carroll and Madison, specifically upon each and every acre." Acts 1857, page 105.

In 1858, the most important act (so far as this litigation is concerned) was passed, because it was in force when the work was done and the contracts and warrants sued on were executed. It is as follows:

"An Act to amend an act entitled an Act forming a Levee District to be composed of the Parishes of Carroll, Madison and Catahoula, *for the better protection of the same from inundation.*"

"Sec. I. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That the 2d section of the above entitled act be amended and re-enacted so as to read as follows: "that for the purpose of building or making and repairing all levees in the said Levee District, the commissioners of the same are hereby AUTHORIZED AND EMPOWERED to assess, annually, A SPECIFIC TAX OF TEN CENTS ON EACH AND EVERY ACRE of alluvial lands situ-

ated between the base of the hills west of Bayou Maçon and the levees on the Mississippi river in the parish of Carroll, and between the levees on the Mississippi river and the western boundary in the parish of Madison."

Sec.2. *Be it further enacted, etc.,* That in addition to the specific *tax herein imposed,* said Commissioners be authorized and empowered to assess an annual ad valorem tax, not to exceed three hundred per cent. on the State and mill tax due on all property assessed in said Levee District."

"Sec. 3. *Be it further enacted, etc.,* That THE TAX HEREIN IMPOSED shall be a first lien and privilege *upon the land subject to the same,* and it shall be the duty of the collector of the levee tax to *sue out an order of seizure and sale as in case of a mortgage, in all cases where* the levee tax has not been paid."

"Sec. 4. *Be it further enacted, etc.,* That no title shall ever be made to lands or land sold for the *non-payment* of the levee tax, until the purchaser thereof has exhibited to the sheriff a certificate from the Auditor of Public Accounts, certifying that all the taxes due on the land sold have been paid."

"Sec. 5. *Be it further enacted, etc.,* That all laws or parts of laws conflicting or contrary to this act are hereby repealed."

"Sec. 6. *Be it further enacted, etc.,* That this act shall take effect from and after its passage." Acts 1858, pages 128, 129.

The act of 10th March, 1859, erected the Board of Commissioners into a corporation. It enacted, "that the said Board of Levee Commissioners of the district aforesaid (Madison and Carroll) *shall be held and deemed a corporation* etc.; gave them the usual powers as to contracting, being sued, etc.; authorized the issuing of bonds, etc., and expressly declared that the act did not "alter or impair the powers of the Board of Levee Commissioners with which they are now clothed for raising the fund to make and repair levees in said district, etc.;" a compliance with certain provisions mentioned in the 7th section being a *sine qua non* to the validity of their acts. See Acts 1859, page 13, page 15, sec 10; page 14, sec. 7.

The warrants, the basis of the judgment in this case, were drawn, as we have already said, under these laws, for work done by contractors on the levees. They were dated in 1859 and 1860; (see pages 52 and 53, already referred to, petition, pages 1 to 5, and judgment, page 28;) and the laws made and in force at that time to secure the payment of the warrants made a part of each contract, and of course subsequent legislation cannot impair such contracts. The warrants were issued under the corporate seal, and for sums of money to correspond with the work done, in this form, viz.:

Providence, La., December 21, 1859.

At sight, the Treasurer of the Board of Levee Commissioners of Carroll and Madison, is hereby authorized

and required to pay to the order of John Fenimore, the sum of thirteen hundred and thirty-three dollars.

"W. SUTTON,
President Board of Commissioners."

"CHAS. R. PURDY,
Secretary Board of Commissioners."

Record, page 52.

Many of the warrants, as soon as issued, were taken from the contractors by the more wealthy planters at the face value, in order to facilitate to work. That is especially the case with those of Fennimore and Bigg, in judgment in this case. Record, 45–47.

It is proper to observe that all *choses in action* are transferrable in Louisiana by contract, and the transferee acquires *the legal title* just as it existed, and subject to the same equities at the time of the transfer. C. C. 1825, Arts. 2612, 2615, 2616.

The following legislation, subsequent to the issuing of the warrants, may have some bearing on the remedy, and we will refer to it with brevity.

By act of 15th March, 1861, embracing eleven sections, the Legislature made a Levee District of the alluvial lands of the parish of Carroll, and appointed a special Board of Levee Commissioners, provided for the election of their successors, and declared their duties. By the 6th section of the act, it was declared: "That the said Board of Levee Commissioners shall *have full control of the levees* and *levee system* in such Levee District, (Carroll parish,) and all rules and regu-

lations passed or made by them relating to the same, such as the providing for the raising and disbursing a revenue to build and repair levees on the Mississippi river and other places, as the case may require, etc., shall have the force and effect of act or acts of the General Assembly of the State of Louisiana; provided always, the said Commissioners shall not assess and collect *in any one year more than five hundred* per cent. on the State and mill tax as found on the tax-roll in said Levee District, unless a vote of the tax-payers in a majority of said wards shall instruct them to collect a larger amount." Acts 1861, page 111, section 6. The Levee Board of Carroll was not declared to be a corporation. At the same session of the Legislature, by another act, approved March 15th, 1861, consisting of seventeen sections, organized the parish of Madison into a separate Levee District. The 8th section enacted "that the Police Jury be authorized to levy and collect, in the same manner that the State and parish taxes are now collected, an annual tax upon the assessed value of the real estate and slaves, as well as personal property, as returned by the assessors of the State taxes; said tax, when collected, shall form a special fund for levee purposes." Acts 1861, page 119, section 8.

The 17th section enacts "that nothing contained in this act shall be so construed as to prevent the present Board of Levee Commissioners of the parishes of Carroll and Madison from levying and collecting a sufficient amount of taxes to pay the outstanding bonds and other liabilities *of the parish*."

In 1867, the Legislature passed an act recognizing the existence of the old Levee Board of Madison and Carroll, authorized the issuance by them of bonds and coupons. The ninth section declared "That the provisions of this act are not to be understood as impairing or limiting any of the powers, rights or duties of said Board of Levee Commissioners as now exist by law, or to restrict, limit or take away any of the rights and powers heretofore given to the holders of the bonds issued under the said act, approved March tenth, eighteen hundred and fifty-nine, or which they may now have, to require the payment with all coupons of interest of the said bonds issued as aforesaid, and to demand the necessary assessments and collections for the payment, the sole intention of this act being to authorize and empower the said Board of Levee Commissioners to arrange with the holders of the said bonds issued under the provisions of said act of the 18th of March, 1859, for the settlement thereof, with the interest which has or may accrue up to the first day of October next, by funding the same, and postponing the maturity of said bonds as provided for above; and if said Board of Levee Commissioners decline or refuse to exercise the powers conferred on them thereby, then this act shall be null and void." Acts 1867, page 271, section 9.

The Constitution of 1868, art. 149, ratified all former laws, except a list of eight, which included that of 1867. The Constitution does not declare the act null, but it does not ratify it.

The Revised Statutes of Louisiana, approved March 14th, 1870, restore to the Police Juries, and they are reestablished in, the right and "power" "To make all such regulations as they may deem expedient, * * *

SECOND. As to the *proportion and direction, the making and repairing of the roads, bridges and causeways, dikes, levees* and other highways, * * *.

EIGHTH. "To levy such taxes as they may deem necessary to defray the expenses of their respective parishes, * * *.

SEVENTEENTH. "*To sue* any person for whose account levees, roads, etc., may have been made or repaired at the expense of the parish, and to obtain the re-imbursement of such amount by privilege on the land subject to the said works."

The suit was originally brought in the State Court, in the usual form, on or about the 23rd day of August, 1867, on warrants amounting, exclusive of interest, to over one hundred thousand dollars. Record, 1 to 6.

While the suit was pending in the Thirteenth Judicial District Court for the parish of Carroll, the Police Jury for the PARISH OF MADISON, availing itself of the law allowing it to become a party, intervened in the suit by filing a petition of intervention. It alleged "That the parties *really in interest as defendants*, are the parishes of Carroll and Madison. That should a judgment be rendered in favor of said plaintiffs, the execution thereof would be enforced against the property of the citizens of said parishes; and that they are the real

parties in interest, *and that your petitioners, as representatives of the parish of Madison*, have large pecuniary interests in the result of this suit." They deny the existence of the Levee Board and plead prescription of five years in bar of the suit. Record, pages 7 and 8.

The Parish of Madison withdrew its intervention Saturday, December 3, 1870.

The plaintiff prayed for the removal of the case into the Circuit Court of the United States. He then amended his petition and pleadings, alleging the Board of Levee Commissioners to be a corporation, and that said William Sutton was its President; "that said corporation had power, among other things, to make contracts for the building of levees to protect the lands of said parishes of Carroll and Madison from overflow and to levy taxes for the payment of the indebtedness created by the building of such levees; that their acts as such Board *were binding and obligatory upon all the inhabitants and owners of taxable property*, and upon the taxable property in the parishes of Carroll and Madison; that the said warrants, drawn by the President of said Board of Levee Commissioners and countersigned by the Secretary of the Board, upon the Treasurer of said Board, described in the original petition, were binding obligations upon said Board of Levee Commissioners, and all persons owning taxable property in said Levee District; that the President, officers and members of said Board of Levee Commissioners, and said Board, are citizens of the State of Louisiana."

The amended petition sets out the allegation of the petition of intervention of the Parish of Madison, wherein it was averred by that Parish that the said Board of Levee Commissioners *had ceased to exist as a juridical person, and that the parishes of Carroll and Madison alone are interested in defending the suit.*

The petitioner Barkley further represented "that his rights could not be defeated by the voluntary abandonment of said Board of Levee Commissioners of the offices which they held, or their neglect to meet as a Board, and that petitioner had the right to consider and hold said Board of Levee Commissioners, who created said obligations, as still in existence, and the service of petition and citation on said William Sutton, President of said Board of Levee Commissioners as an existing corporation, and upon not only the Police Juries of said parishes of Madison and Carroll, but also upon all persons residing in or holding taxable property in said parishes of Carroll and Madison, and upon all taxable property in said parishes of Madison and Carroll, and a right to cause said Board of Levee Commissioners *and the Police Juries of said parishes* of Madison and Carroll, according to their respective populations, to levy taxes for the payment to petitioner of said obligations sued on."

The Police Juries of the said two parishes were made parties, and judgment was prayed against the Levee Board for the whole, and the Police Juries for the respective portions of said sums of money and in-

terest claimed in the original petition, and that they assess a tax for the payment thereof." Record, pages 15–17.

Sutton, the President of the Board of Levee Commissioners, by plea. denied that he was President of the Board of Levee Commissioners in the Levee District of Madison and Carroll, and denied that he was President at the time citation was served on him in the suit." Record, page 20.

The two Parishes pleaded to the jurisdiction. Page 19, pages 20-22.

The Parish of Carroll also answered, denying the corporate existence of the Board of Levee Commissioners; denied their right to create debts beyond cases where express permission was granted by the Legislature so to do; and that as (as it avers) no authority can be found in the statutes to issue said warrants, it denied that the alleged Board had any authority to bind citizens or the lands of the Parish of Carroll for the payment of its alleged obligations; that if said obligations were ever contracted, they must be satisfied from the *proceeds of the property of said Board*, and that the property ot the Parish of Carroll is in no way liable for the same. Record, page 21. The plea of prescription of five years was pleaded in bar. Record, page 21.

The Parish of Madison pleaded, in substance, the same defence. Record, 23, 24.

The exceptions were overruled by Judge Durell. Record, page 26.

This decree was opened, and the exceptions were again argued before Mr. Justice Bradley and overruled. Record, page 28.

The existence of the Board of Levee Commissioners having been established, as shown by the overruling of the pleas, a judgment by default was taken, which was, after the usual delay and upon proof, made absolute against the Levee Board. Record, page 26, pages 27 and 28.

Subsequently, the Police Juries caused the *pleas of prescription* (as peremptory exceptions) to be set down for trial, and they were also overruled. Record, 34.

In the meantime, an execution was issued on the judgment against the Levee Board; but Sutton, the President, was absent, and the writ was returned unexecuted. Record, page 29.

An alias fi. fa. was then issued, and nothing was made. Record, page 31.

A pluries fi. fa. issued, and was returned unexecuted, on account of the death of Sutton, the President of the Company. Record, page 33.

An alias pluries fi. fa. issued, and all the demands and notices which are required to be made by law, as far as possible, were made. Record, pages 36, 37.

In the meantime, the Police Juries of Madison and Carroll, so fertile in exceptions, file another set of exceptions, this time denying that *the petition which they have answered on the merits* contains any cause of action. Record, page 37.

The executions issued upon the judgment having proved unavailing, Barkley filed a petition for a mandamus, according to the forms of Louisiana practice.

The petition for a mandamus shows the preceding facts. It alleges that the suit was brought "for divers large sums of money due upon levee warrants or levee scrip, being evidences of debt for work and labor done upon the levees in said parishes of Madison and Carroll, *to protect the inhabitants of said parishes and all therein from inundation and overflow*, and for the payment of which said evidences of debt, the laws of Louisiana had provided the assessment and collection of taxes, *liens* and *privileges* upon all taxable property in the aforesaid parishes of Madison and Carroll; said evidences of debt being in due form and of various dates, and having various acknowledgments thereon, as more at large set forth in the petitions in said suit, to which, and to the warrants themselves on file, reference is made for greater certainty."

Petition refers to the commencement and original suit, and the making the Police Juries of said parishes parties, and makes the suit a part of this proceeding. After setting out the judgment, it refers to the former legislation, and shows that the Board of Levee Commissioners were made a body corporate in 1859; that although by the act of the State Legislature of the State of Louisiana, approved March 13, A. D., 1861, power to assess and collect any more taxes, except such levee tax as might be necessary to meet the indebtedness of

said Board of Levee Commissioners was taken away, and although each of said parishes was made a separate Levee District, (having the Police Juries of the respective parishes with the usual corporate powers of Police Juries,) by these acts of said Legislature, approved 15th and 16th March, 1861, and by one act, approved 28th March, 1867, among other things continued the Board of Levee Commissioners of Madison and Carroll in office without further diminution of their powers, with power to fill vacancies until their successors should be elected and qualified, but that the Constitution of Louisiana in 1868, excepting said last mentioned act from ratification, petitioners aver that said provision in said Constitution, so far as the same operated upon the contract under which your petitioner had brought suit, was void, as impairing the obligation of contracts, and in contravention of the Constitution of the United States."

Petition shows who were the members of the Board when the suit was commenced; who were members at the filing of the petition for a mandamus, and avers that no election for new members had been made, and Board had neglected to fill vacancies.

Shows the issuance of executions, and the return of the fi. fa. unsatisfied, and alleges that "now, since the death of the President, William Sutton, it is pretended by the said surviving officers, as well as by the said Police Juries of said parishes of Madison and Carroll, that said Board of Levee Commissioners is dis-

The executions issued upon the judgment having proved unavailing, Barkley filed a petition for a mandamus, according to the forms of Louisiana practice.

The petition for a mandamus shows the preceding facts. It alleges that the suit was brought "for divers large sums of money due upon levee warrants or levee scrip, being evidences of debt for work and labor done upon the levees in said parishes of Madison and Carroll, *to protect the inhabitants of said parishes and all therein from inundation and overflow*, and for the payment of which said evidences of debt, the laws of Louisiana had provided the assessment and collection of taxes, *liens* and *privileges* upon all taxable property in the aforesaid parishes of Madison and Carroll; said evidences of debt being in due form and of various dates, and having various acknowledgments thereon, as more at large set forth in the petitions in said suit, to which, and to the warrants themselves on file, reference is made for greater certainty."

Petition refers to the commencement and original suit, and the making the Police Juries of said parishes parties, and makes the suit a part of this proceeding. After setting out the judgment, it refers to the former legislation, and shows that the Board of Levee Commissioners were made a body corporate in 1859; that although by the act of the State Legislature of the State of Louisiana, approved March 13, A. D., 1861, power to assess and collect any more taxes, except such levee tax as might be necessary to meet the indebtedness of

said Board of Levee Commissioners was taken away, and although each of said parishes was made a separate Levee District, (having the Police Juries of the respective parishes with the usual corporate powers of Police Juries,) by these acts of said Legislature, approved 15th and 16th March, 1861, and by one act, approved 28th March, 1867, among other things continued the Board of Levee Commissioners of Madison and Carroll in office without further diminution of their powers, with power to fill vacancies until their successors should be elected and qualified, but that the Constitution of Louisiana in 1868, excepting said last mentioned act from ratification, petitioners aver that said provision in said Constitution, so far as the same operated upon the contract under which your petitioner had brought suit, was void, as impairing the obligation of contracts, and in contravention of the Constitution of the United States."

Petition shows who were the members of the Board when the suit was commenced; who were members at the filing of the petition for a mandamus, and avers that no election for new members had been made, and Board had neglected to fill vacancies.

Shows the issuance of executions, and the return of the fi. fa. unsatisfied, and alleges that "now, since the death of the President, William Sutton, it is pretended by the said surviving officers, as well as by the said Police Juries of said parishes of Madison and Carroll, that said Board of Levee Commissioners is dis-

solved by various acts of the Legislature, and by the Constitution of Louisiana of 1868, and by the death and resignation of the members of the Board, and that there is no one to answer for said Board of Levee Commissioners, *and they also unjustly pretend that there is no power to enforce said judgment in favor of petitioners.*"

The petition recites allegations of the intervention.

It also represents "that by the various repeals of the general statutes on the subject of the levees, the Police Juries of the respective parishes have become seized of the jurisdiction over the territory of their respective parishes, and should the death of William Sutton, since the rendition of said judgment and the death of Samuel P. Chambliss, prevent the Board of Levee Commissioners from acting as a Board, when it is the duty of the Police Juries of the respective parishes of Carroll and Madison, exercising like jurisdiction over the same territory, to assess in proportion to the taxable property of the parishes as returned to the State Auditor, and collect sufficient taxes on the property to pay said judgment, interest and costs to petitioner."

Petitioner further represents "that he is advised that he cannot be deprived of his rights by the division of said Levee District by said acts of 1861, nor by the repeal (if such it be,) of the act of 1867, nor by the failure to elect members of said Board of Levee Commissioners, but that the law will furnish adequate relief by writ of mandamus, so that there shall be no failure of justice, and if it shall appear that neither the

said Board of Levee Commissioners nor the said Police Juries can assess and collect said tax, then, this Hon. Court will direct the marshal of the United States, *as is provided in analogous cases in the State Courts*, to assess and collect the tax upon the taxable property in the said parishes of Carroll and Madison, to pay said levee warrants or judgment, interest and costs."

Petition prays for a mandamus after cause shown against such of the Board of Levee Commissioners as now survive, to proceed and assess and collect the tax; that if the Court should be of the opinion, they have not such power, and cannot fill vacancies in their body, then, that the Police Juries of Madison and Carroll perform the duty, and assess and collect sufficient tax to pay said judgment, or if the Court shall be of the opinion that it has not power to make either of said orders, that then it order the marshal in person, or through some competent officer, to assess at once or by installments from year to year; if it be deemed advisable to collect sufficient taxes upon property subject for levee purposes in said parishes to pay said judgment debt, interest and cost and general relief. Record, 28 to 41.

Service was made on the *Police Juries* of Madison and Carroll, and under the order of court, on the surving members of the Board of Levee Commissioners. Record, 41, 42.

The three survivors of the Board of Levee Commissioners, Morancy, Bedford and Cochrane, plead in bar:

1. That the Circuit Court has no jurisdiction.

2. "That the said corporation is defunct or suspended by resignation of the President and of your respondents, and by the death of William Sutton, late President of said corporation, before service of this rule *nisi*"

3. That respondents are incompetent to represent said corporation, because there is not a quorum remaining, and the survivors are all citizens of Madison parish, whose term of office expired by law November 1st, 1862.

4. That they were disfranchised by acts of Congress approved March 2, 1867, March 27, 1867, and July 19, 1867.

5. That respondents were disqualified by the Constitution of Louisiana of 1868 and act of the Legislature of Louisiana No. 39, they having given aid to and held offices under the Confederate States.

And if said objections are overruled, respondents further plead:

FIRST. That the court is without jurisdiction for want of evidence of service of petition and citation on Sutton, President, and all proceedings are *coram non judice.*

SECOND. That the judgment is null and void for want of citation.

THIRD. Because it is on obligations which are void.

FOURTH. Because said levee warrants or scrip are prescribed by five years.

Record, pages 42, 43.

The Parish of Madison pleads lis pendens, and also, that it is not the same political body as the Board of Levee Commissioners, and not vested with powers to assess and collect the taxes to pay the debts of the Levee Board. Record, pages 43, 44.

Messrs. Samuel R. & C. L. Walker, the counsel of all the parties, opposed the application for the mandamus.

On the 4th day of April, 1874, a decree was entered granting the mandamus. Record, pages 47, 48.

A new trial was subsequently entered (Record, page 49,) and on the second trial a judgment was rendered in favor of respondents. Record, pages 49, 50.

The points of law brought up to this court by the writ of error are raised by two bills of exception: one was taken to the refusal to admit testimony and to the ruling of the court on the merits of the question.

The first bill of exception shows that the plaintiff offered to prove "that the warrants sued on [which are in evidence] were in the form adopted and used by the Board of Levee Commissioners, and were used from time to time, as the work upon the levees in the Levee District was performed, and that the payees of said warrants, who had endorsed the same, were all levee contractors for building the levees in said district,

composed of the parishes of Madison and Carroll, and had performed a large amount of work thereon."

In objecting to this testimony, the Levee Commissioners and Police Juries divided, and took separate objections:

THE LEVEE COMMISSIONERS, Morancy, Bedford and Cochrane, objected "that the warrants SUED ON ARE MERGED in the judgment set up.

The POLICE JURIES of Madison and Carroll objected "that the testimony offered was as to them, *res inter alios acta* and *irrelevant*, and *that the plaintiff could not go behind his own judgment.*"

These objections were sustained, and the testimony excluded. Bill of Exception, Record, page 50.

The bill of exceptions to the rulings of the court on the trial on the merits, shows what facts were before the court, and made the basis of its rulings. The two following points were ruled in favor of plaintiff, and are here set down in order, the more closely to define the questions before this court, viz: the court affirmed:

1st. "That this cause standing upon the record and judgment execution and return, the obligations sued on used in the trial and offered in evidence in this proceeding and the proceedings of the said Board of Levee Commissioners on the 13th and 14th days of September, A. D., 1867, also offered in evidence marked '10,' (see Rec. page 25) and now again offered in evidence, and no proof having been offered by the defendants, the judgment in this case cannot be contested in this pro-

ceeding by *said Levee Commissioners*, Morancy, Bedford and Cochrane, and must be held as valid." Rec. page 51.

2. And that "for the same reasons said judgment is not open to objection by the said *Police Juries of Madison and Carroll.*" Rec. page 51.

The court ruled the four following points *against* the plaintiff who had requested the court to adopt them for the decision of the cause, viz:

3rd. "That said Morancy, Bedford and Cochrane, as surviving members of said Board of Levee Commissioners, have power to fill vacancies, and under the authority of the court, to levy, assess and collect the levee taxes annually authorized by the laws in force at the time said obligations were issued in said Levee District until the said judgment shall be paid."

4th. "That in the event of inability on the part of said Levee Board to levy and assess and collect the said taxes, the said Police Juries succeeding to the powers of the said Levee Board, and exercising like jurisdiction over the same territory, have the power, under the authority of this court to assess, levy and collect the said levee taxes for the payment of the said judgment, in accordance with the said laws and the laws in pari materia."

5th. "That the plaintiff is entitled to a peremptory mandamus to cause the levy, assessment and collection of the said levee taxes to be made to satisfy and pay the said judgment."

6th. "That the plaintiff is entitled to the remedy of a mandamus, directed to the Marshal of the United States for the District of Louisiana, after a reasonable delay to be fixed by the court, to assess and levy and collect said levee taxes prescribed by the laws in force in 1859 and 1860, for the assessment and collection of said levee taxes in the Levee District composed of said parishes of Madison and Carroll in the years 1859, 1860, unless said Levee Commissioners, H. P. Morancy, Thos. C. Bedford, and John P. Cochrane, either with or without a full Board to be elected by themselves, proceed to assess, levy and collect said levee taxes, or the same shall be done within the same time by the Police Juries of the said parishes of Madison and Carroll, and that the said taxes, when collected by said Marshal or said Board of Levee Commissioners, or said Police Juries, as the case may be, shall be paid upon said judgment from time to time, and if need be, from year to year, as fast as collected, until said judgment is satisfied."

And the said court having refused to adopt any one of said propositions, numbered three, four, five and six, requested by the plaintiff's counsel, ruled ex proprio motu, adversely as follows, viz: "That since the death of William Sutton, the President of said Board of Levee Commissioners, said defendants in this proceeding, Honore P. Morancy, Thomas C. Bedford, and John T. Cochrane, are the only surviving members of said Board of Levee Commissioners, and they all reside in the parish

of Madison; that the law requires the like number to be appointed or elected in the parish of Carroll, and since the death of said Sutton, said parish of Carroll is without any representative on said Board; that the three survivors above named *do not constitute a quorum or majority*, and therefore are incapable of filling vacancies in the said Board, and incapable of assessing the levee taxes for the payment of the said judgment of the plaintiff; and that there is no law which would authorize said Police Juries of the said parishes of Madison and Carroll to assess and collect, in their respective parishes, a tax for the payment of said judgment; and that the court is without authority to appoint the Marshal of the United States, for this district, to exercise the duties and discretion which were vested by law in the Board of Levee Commissioners, *and that there being no person who can assess said levee tax*, this application for a mandamus must be dismissed."

The rulings ex proprio motu were also excepted to. See Bill of Exception, Record, page 50-52.

Document "10," annexed to and made part of the bill of exception, shows proceedings of the Levee Board, consisting of five members, in September, 1867. Record, page 25 and 26.

Extracts from the Auditor's report, made partof the bill, shows the relative proportion of land subject to overflow, and personal property in the two parishes, (Record, page 55,) and furnishes a base of a division of assessment for the two parishes. So that it can be

readily seen that it is in the power of the court to readily adjust the respective proportions of the assessment for the two parishes. Record, 53-55.

The complex nature of the propositions considered by the court, in which the one gives rise, upon its overthrow, to the other, creates hesitation in the mind of counsel as to the mode of stating the assignments of error, so as to bring the questions in the clearest manner before the court.

Assignments of Error.

The said James M. Barkley comes and assigns the following errors in the record and proceeding in the Circuit Court of the United States for the District of Louisiana, in the above entitled case, viz.:

I. The court erred in refusing to allow the plaintiff "to prove by said witness, Arthur Alexander, and other witnesses, on the trial of the issue upon the petition for a mandamus, that the levee warrants sued on were in the form adopted and used by the Board of Levee Commissioners, and were issued from time to time, as the work upon the levees in the Levee District was performed; that the payees of said warrants, who had endorsed the same, were all contractors for the building of levees of said district, composed of said parishes of Madison and Carroll, and had performed a large amount of work thereon;" on the ground "that

the warrants sued on *are merged in the judgment* set up, and "that the testimony was res inter alios acta and irrelevant, and that plaintiff could not go behind his own judgment"

II. The said lower court erred in holding and ruling on the trial of the application for a mandamus, that Honoré P. Morancy, Thos. C. Bedford and John T. Cochrane, the surviving members of said Board of Levee Commissioners, "are incapable of filling vacancies in said Board, and incapable of assessing the levee taxes for the payment of the said judgment of the plaintiff, and in holding that there is no law which would authorize the Police Juries of the said parishes of Madison and Carroll to assess or collect in their respective parishes a tax for the payment of said judgment; and that the court is without autthority to appoint the Marshal of the United States for this district to exercise the duties and discretion which were by law vested in said Board of Levee Commissioners, and that there" was "no person who could assess said levee tax," and that the mandamus, for those reasons, should be dismissed.

III. That the said Circuit Court erred in overruling all and each of the following propositions, viz.:

"3d. That said Morancy, Bedford and Cochrane, as surviving members of said Board of Levee Commissioners, have power to fill vacancies, and under the

authority of the court, to levy, assess and collect the levee taxes annually authorized by the laws in force at the time said obligations were issued in said Levee District, until the said judgment shall be paid."

"4th. That in the event of inability on the part of said Levee Board to levy and assess and collect the said taxes, the said Police Jury succeeding to the powers of said Levee Board, and exercising like jurisdiction over the same territory, have the power, under the authority of this court, to assess, levy and collect the said levee taxes for the payment of the said judgment, in accordance with the said laws and the laws in pari materia."

"5th. That the plaintiff is entitled to a peremptory mandamus, to cause the levee, assessment and collection of the said levee taxes to be made, to satisfy and pay said judgment."

"6th. That the plaintiff is entitled to the remedy of mandamus, directed to the Marshal of the United States for the District of Louisiana, after a reasonable delay to be fixed by the court, to assess and collect said levee taxes prescribed by the laws in force in 1859 and 1860, for the assessment and collection of levee taxes in the Levee District composed of said parishes of Madison and Carroll in the years of 1859 and 1860, unless said Levee Commissioners, H. P. Morancy, Thos. C. Bedford and John P. Cochrane, shall, either with or without a full Board, to be elected by themselves, proceed to assess, levy and collect said levee taxes, or the same

shall be done within the same time by the Police Juries of the said parishes of Madison and Carroll, and that the said taxes, when collected by said Marshal, or said Board of Levee Commissioners, or said Police Juries, as the case may be, shall be paid upon said judgment from time to time, and if need be from year to year, as collected, until the said judgment be satisfied."

IV. The said Circuit Court erred in ruling that plaintiff in error was not entitled to the benefit of a writ of mandamus, and in refusing his petition for a mandamus, and in rendering judgments against him and in favor of defendants, and dismissing his petition.

ARGUMENT.

I. If the case takes the same course in the argument here as it did in the lower court, it will not be important to insist on the error in excluding the testimony, for the nature and meritorious character of the labor done on the consideration of the warrants was not denied.

The several rulings of the Circuit Court on the merits are based on the belief that the action of the State government and the death of Wm. Sutton have destroyed plaintiff's remedy. *The validity* of the plaintiff's judgment is admitted by the court as binding upon all parties, but the court *a qua* thought it was without power to afford relief to the plaintiff.

It can hardly be doubted that as the law stood in 1860 *and* 1861, *the State courts as they then administered the law, would,* on the same condition of facts which we have

now, have granted relief to the plaintiff in some of the forms presented.

In these cases, as it will be subsequently shown, the Louisiana courts have applied laws in *pari materia* to the settlement of such questions, and in ordinary times, when debts are not considered as unusually burdensome and most people anxious to pay them, the courts find no trouble in carrying into effect the mandate of Art. 21 of the Civil Code, viz: 'In all civil matters, where there is no express law, the *Judge is bound to proceed* and decide according to equity. *To decide equitably, an appeal is to be made to natural law and reason or received usages where positive law is silent.*" C. C. Art. 21.

The equity as directed to be applied in such cases is a totally distinct thing from the equity of the common law, which is governed by fixed rules. The provision of the Civil Code is a more comprehensive statute, and supplies the judge with rules for his guidance as much in cases which are on the law as the equity side of the State courts

We have elsewhere shown that the building of the continuous levees add directly to the value of all property protected by them; that each tract of land is as much benefited by the labor bestowed upon the levees as it could be by the most costly ditches, buildings or machinery. For without the levees, all improvements are capable only of imperfect use, and the lands become almost valueless.

With the levees built, the lands in this district be-

came of great value and of inexhaustible fertility. We desire to impress upon the mind of the court the condition of the alluvial lands in this district, where all the lands are more or less protected, and many of them are as much rescued from intractable natural forces, as the lands of Holland are rescued from the sea. The man, therefore, who has, by building a levee, protected the land of his neighbor from overflow, and enabled him to make crops and live securely, has added as directly to that neighbor's wealth, as he would have done had he put the money in his neighbor's pocket.

The money of the man who builds the levee goes nowhere else than to the owner, and benefits no one else than the owner of the property protected by the levee, and the levee is built with no other intention than to benefit the lands and property within the region subject to overflow.

Now, if we apply the declared maxim embodied in article 1960, C. C. of 1825, and article 1965, Rev. C. C.: "That no one ought to enrich himself at the expense of another," it is clear that equity requires the land owner to reimburse the necessary expenses of the levee builder which have enriched him. Now, under the old law, the front proprietors built the only levees on their land and joined them to their neighbors, but as some did not built as high as others, the labors of all were uncertain and in jeopardy. The old law, to protect as far as possible the consequence of the defects of individual and independent

labor, appointed levee inspectors. In Madison and Carroll, we have seen the Board of Levee Commissioners become the agents of the planters, and for several years they performed their functions as the overseer of a road or a tax collector does, without being a corporation. But the planter whose lands had been protected, in equity, did not the less owe for the improvements on or in his place, to the contractor who expended his money to make them.

The difference between this sort of agency and that of ordinary corporations, is this: here all the money and all the labor expended by the levee builder goes directly or mediately into the pocket or estate of *the owner of the protected property* whose wealth is augmented thereby.

In an ordinary corporation all the money, labor and capital lent to it, remain the property of the corporation, and are represented at the dissolution of the corporation in its effects, as money and property; and the dissolution of the corporation does not prevent the court from taking charge of the assets and distributing them according to law. And the assets represent and are the legal equivalents of the debts, and the creditor when he gets his share of the assets, gets his own again.

Now, where an agency is created for *one single purpose*, and the money raised by them for that one object, is in fact, by its disbursements transferred into the pockets of their principals, who have become so much

the richer thereby; the principal whose estate is enriched is the debtor; and is it not against every principle of equity, that the principals should escape payment by destroying or denying the agency?

In the one instance, what is left by the corporation at its dissolution, is for the creditors, and is distributed; in the other, the planter who has been enriched, and who has derived all the advantage from all the funds expended by the contractor, is, by defendant's counsel, supposed to be able to escape responsibility because he has succeeded in getting his agents to resign, or to refuse to act or fill vacancies.

There is no more analogy between the two cases and the principles of law controlling them, than that of these two corporations; the one is a mere agency acting for others, and the other a juridical person owning its own gains.

The laws in force in Louisiana are ample to afford redress on the dissolution of both corporations The civil law action, *de in rem verso*, would furnish the redress in the case at bar, if it be necessary to indicate the action. See example where it is used by the surety, (who became such, *against the will of the debtor* and paid the debt,) to recover from the debtor the money paid the creditor. 2 Vol. Zachariae, Droit Civil, page 68, § 427. Seconde Partie, Livre Premier, Brussells Ed. 1842.

And the application of the equitable rules of the civil law are to be invoked where needed to return to

the laborer the wages from those who have profited by them, as article 21 C. C. commands.

And in a case of the Board of Levee Commissioners, entitled Templeton vs. Morgan, 16 Annual, 441, the Supreme Court of Louisiana, under the same statutes, supplied from statutes *in pari materia*, provisions needed to carry into full effect the collection of these levee taxes. The court say:

"In the absence of any special provision of law as to the manner in which the levee tax collector should make the sales of the property of delinquent tax payers, we must have recourse to other laws *in pari materia*." The court then shows that the levee tax collector is to be guided by the rules established for the guidance of the State Tax Collector. When the levees were built under the law under which we claim, the alluvial lands were bound for an annual and specific tax of *ten cents* on each and every acre for the repayment of the money. This was not a tax in the ordinary sense of the word; it was a lien on the land for work done to enhance its value. The law declared "The tax herein *imposed* shall be a first lien and privilege on the land."

Having thus created and imposed the lien on the property to be benefited, it immediately steps aside from the ordinary routine of tax collection and directs the use of the ordinary process and suit in cases of mortgage and one the courts ordinarily apply to mortgages between individuals. It adds "And it shall be the duty of the collector of the levee tax to sue *out an*

order of seizure and sale as in case of a mortgage in all cases where the levee tax has not been paid." Acts 1858, page 129, sections 1, 2, 3 and 4. The assessment was not therefore a mere tax; it was a debt which would sustain an action.

The Supreme Court of Louisiana, speaking of the tax in this Levee District before the corporation had been created, says: "*An assessment* for levee purposes is *not a lax in the strict legal sense* of the term, although it is true the Legislature has called it so in the act whose constitutionality is attacked. * * * *But a principle of equity* which exists independent of any constitutional recognition would dictate that *the assessment should be made upon the land of each proprietor* as nearly as practicable in proportion to the benefit received." Yeatman vs. Crandell, 11 Ann., 221.

After the act of 1857 the question of the nature of the assessment came up again, and the court again decided it was not a tax, and said: "But it is not pretended but that the plaintiff (the tax payer) *is benefited to the full amount* of his assessment. The money he pays *to the agents* appointed to protect his property *is restored to him in the increased value of his lands and their security from overflow.* The argument that he may not wish to sell or cultivate his lands, and that he may prefer that the soil should be increased by overflow each year, cannot be admitted. *Salus populi suprema lex.* The obstinacy of a proprietor in one case, or the wishes of a capitalist who holds for speculation in another,

cannot be permitted to stand in the way of the safety of a whole community."

Wallace vs. Shelton, 14 Ann., 500. See also Selby vs. Levee Commissioners, 14 A., 434. Swartz vs. Flat Boats, 14 Ann., 246. The Drainage Company, 11 Ann., 373.

These cases distinguish the draining and levee assessments from taxes which go into the treasury. As the Legislature says in an act already quoted, the assessment was to be made against those *benefited* by the levees. In the case of Crowley vs. Copley, 2 Ann, 330, the Supreme Court recognize the right of the Levee Contractor to proceed directly against the owner of the land on which the levee was built, under the former law, and the only foundation for such an action was on the ground of a benefit to the owner. For this right was granted him *when the forms of the law had not been observed.* If there had not existed an equitable right, the failure to observe the forms of law would have left the contractors without remedy. 2. Ann., 330. But the court, while authorizing the suit against the Police Jury, says: "It is true that the plaintiff (the levee contractor) made no attempt to have the land seized summarily and that the proprietor is liable in an ordinary action upon a *quantum meruit* to pay such an amount as he had been benefited by the work done." Newcomb vs. Police Jury, 4, Rob. Rep., 233. Knox vs. Police Jury, 4 Ann., 62.

The parish is bound, when all remedies against the

owners are exhausted. Brown vs Police Jury of Madison, 4 Ann. 180.

Considering that "*the Police Jury are nominal defendants, and that it is the tax payers who are to be affected by our decision*, we cannot hold them to admissions made by their agents." Brown vs. Police Jury, 4 Ann. 181.

See also Semel vs Gould, 12 Ann. 225.

But the Police Jury bind the *tax payers* by the judgments rendered against them. The question was considered in the case of Police Jury vs. Scoggin, 11 Ann. 629.

The question was whether the judgment confessed by the President of the Police Jury was *res judicata* against each individual tax payer. The court held that it was. Premising that the Board of Levee Commissioners, so long as it existed, had the same power to stand in judgment for its principals, as the Police Jury for the owners of the alluvial lands, we proceed to quote the language of the court on the validity of the judgment against the Police Jury for a debt binding the lands only and to be paid out of the taxes to be collected on such lands, viz:

"The nature of municipal corporations is such, that they, of necessity, represent all the citizens of the territory or district submitted to their jurisdiction by classses, as well as collectively. As it would be impossible to conduct a proceeding against each and every inhabitant of a parish, they are represented by

their Police Jury. If the Police Jury can represent the inhabitants collectively, it can represent them by classes for the same reason. So the Legislature of the State not only represents the electors who have chosen the representatives composing the Legislature, but also all other classes composing the State, such as women, minors, denizens and aliens, within its limits. So of a city, the municipal authorities, while they represent the whole body of the citizens within the limits of the city, represent the same by classes. They represent the merchant, the draymen, the laborers, the mechanics, the physicians, the lawyers, and the laboring men of all classes. So the Police Jury represents the tax payers by classes; those who pay taxes upon land, as well as those who pay taxes upon slaves, upon movables, upon capital, upon employments, or those who pay merely the poll tax. A judgment, therefore, against the Police Jury as a representative of a single class, must be as obligatory upon that class as a like judgment would be against the Police Jury as the representative of the whole. The effect of such judgment is, in this respect, precisely as that rendered against the administrator of a succession. It—the judgment against the administrator—binds not only the heir of full age, who is *sui juris*, but the married woman, the emancipated minor, the minor heir, whether with or without a tutor. The judgment of the District Court must, therefore, be held obligatory on the plaintiffs. In the absence of an appeal or action of nullity, it is obvious

that no irregularities in the form of the proceeding before the District Court can be inquired into after one year has elapsed from the rendition of the judgment. If the Police Jury were regularly cited, or made its appearance, no inquiry can now be entertained whether the power to confess judgment was or was not formally conferred by sufficient authority."

See also Habich vs. Folger, 20 Wall. 7.

It is now clearly shown that the Police Juries represent the tax payers in their respective parishes in all matters not confided to other bodies; and as the law was understood and administered in the State courts at the time the work was done for which the warrants sued on were given, there would have been no difficulty in enforcing these demands against the tax payers. By way of digression, if it should be asked, why then did we not remain in the State court, we may say, that when this suit was removed, a majority of the Louisiana Supreme Bench had been members of the Convention of 1868, which showed its hostility to the levee warrants by article 129 of that Constitution; and one, if not more, of the judges owned, it was said, large tracts of land in Madison and Carroll which were to be effected by this suit.

But to proceed. The *ex post facto* acts of the Legislature, which withdrew from the Board of Levee Commissioners these powers, (as we have seen,) still left them power to levy and collect the taxes to pay the liabilities then outstanding.

Acts 1861, page 120, sec. 17. See Acts 1867, page 271, sec. 9.

It is therefore clear that the judgment rendered in this case while the corporation existed bound all the tax payers in the alluvial district of Madison and Carroll as effectually as it would have done had the judgment been against the Parishes of Madison and Carroll separately. The learned counsel for the Parish of Madison, when he said in the intervention (Record, page 7.) "*That the parties really in interest as defendants are the Parishes of Carroll and Madison;* that should judgment be rendered in favor of said plaintiff the execution thereof would be enforced against the property of the citizens of said parishes, and that they are the real parties in interest, and that your petitioners, as the representatives of the Parish of Madison, have a large pecuniary interest in the result of this suit," was merely affirming the law as then well understood.

And, as we have already seen, the Legislature considered that the debt is divided, and that the Police Juries owed it, for the Levee Board was authorized to collect taxes to pay these *debts of the parish.* Acts 1861, page 120, section 17.

It results from what we have shown by the authorities:

1st. That the land owners and tax payers who have primarily received the benefit of the contractor's labors in building the levees are equitably bound as mortgagors for payment of the debt which enured to their benefit.

2d. That they are bound by a judgment against their agents, the Board of Levee Commissioners, in the same manner as they would have been had it been against the Police Jury.

The question arises whether this judgment, which must now be conceded on all hands to be valid, can be *judicially* enforced? It is equitably and honestly due by the property holders within the overflowed district, and was declared to be a lien on the property. The defendants say that the death of Mr. Sutton, since the rendition of the judgment and the issuing of execution, has destroyed the right; that the corporation has no longer *a quorum*, and that therefore it ceases to exist as a body capable of action. But the death of a testator or intestate does not avoid a judgment, nor authorize the devisee, legatee or heir to receive the estate without bearing the burdens imposed by its previous owner.

So here the judgment binds the tax payer, whether the agent who represents the tax payer (who has increased his estate by the disbursement) is the Police Jury or the Board of Levee Commissioners; the Louisiana law, which is governed by the equitable maxim that no man shall enrich himself at the expense of another, will furnish the relief. It is a confession that ought not to be made that there can be a right without a remedy, and it does not occur to us that the case at bar, notwithstanding the efforts of the tax payers and State authorities to defeat it, is in quite so deplorable a condition as to be without a remedy.

Not knowing what view may meet the approval of the court, it becomes the duty of counsel to present to the court modes of proceeding which seem feasible and warranted by the law of Louisiana.

The right which the law gave the levee contractor to be reimbursed by those who are enriched by his labor was a vested right which could not lawfully be taken from him. Any attempt to defeat the recovery is clearly unconstitutional and makes it the duty of the Federal courts in such case to take the needed means to counteract the unconstitutional measures. Such action, therefore, ought to be taken to defeat the unconstitutional provision of the Louisiana constitution of 1868, and the acts of 1861, adverse to plaintiff's rights.

II. It occurs to counsel for the plaintiff that this court, under the absolute equitable powers conferred by act 21 of the Civil Code, is not limited to any one particular mode of proceeding to enforce a judgment which is manifestly binding upon the tax payers in the overflowed district. This case offers three very obvious modes of proceeding, either of which would sustain our mandamus.

The case in the 16th Annual Rep. shows that statutes in *pari materia* are to be invoked to supplement omissions to give full effect to the legislation under which the rights were acquired.

Now, the case at bar is clearly within the spirit and intendment of the act of March 6, 1869, wherein it is

provided, sec. I: "That hereafter, whenever a judgment for money is rendered by any court of competent jurisdiction against a Parish of this State, the judge who shall render the judgment shall in the same decree order the assessor forthwith to assess a parsih tax at a sufficient rate per centum upon the assessment roll of the current year to pay and satisfy said judgment, with interest and costs.

Sec. 2. That whenever any judgment for money has heretofore been rendered by any court of competent jurisdiction against a parish, the judge shall, on motion, order forthwith the assessor to assess the taxes provided in the first section of the act.

Sec. 3. That in such decree of judgment, the judge shall provide that immediately upon the assessment of the tax by the assessor of the parish, the parish tax collector shall proceed forthwith to collect said tax in the same manner that parish taxes are now collected, and the proceeds shall constitute a special fund out of which judgment, interest and costs shall be paid, and shall not be diverted to any other purpose, provided sufficient proof be furnished to the judge that there are no funds in the parish treasury to satisfy said judgment." Revised Statutes of 1870, page 539, sec. 2747; page 485, 2050.

Mandamus was also allowed by the act of 1853, page 234, sec. 2. Revised Statutes, 1856, 411, sec. 25, against a parish or authorities of towns and cities, directing sheriff or other tax collector to collect the tax, and

the act is carried into the Revised Statutes, 1870, page 485, sec. 2450.

The phraseology of the act above quoted is changed in the Revised Statutes of 1870, so as to read, "Hereafter, whenever a judgment for money is rendered by any court of competent jurisdiction against a parish of this State, the judge who shall render the judgment shall, in the same decree, order *the Board of Assessors or Parish* officers whose duty it is to assess taxes, to assess a parish tax at a sufficient rate upon the assessment roll of the current year to pay and satisfy said judgment, with interest and cost." Sec. 2747.

"Whenever any judgment for money has heretofore been rendered by any court of competent jurisdiction against a parish, the judge shall, on motion, order forthwith the Board of Assessors or parish officers whose duties it is to assess taxes, to assess the tax as provided in the two thousand seven hundred and forty-seventh section of this act." Sec. 2748, page 539 Revised Statutes 1870.

These statutes, it will be observed, attach no special sanctity to the mode of collecting the tax. It is the assessors, or parish officers, or sheriff, or other tax collectors, etc., who may be employed by the court as the instrument. The primary idea of the Louisiana law, as we have seen, is *that the land owner or tax payer owes the debt for the benefit conferred on him*, and that the Police Jury merely repesents the tax payer in bargaining for the work to be done, and that the judgment

against the Police Jury or Levee Commissioners is conclusive against the tax payer. "As a legal entity, the Parish cannot suffer by an unjust judgment; it is *the people* thereof or the tax payers who will feel the burden" Flag vs. Parish St. Charles, 27 Ann. 320.

Three of the Board of Levee Commissioners appear and defend this application for a mandamus. The Police Juries have also appeared, and strenuously defended the case, from its removal into the Circuit Court up to the present time.

The Circuit Court had, therefore, power to order the surviving members of the Board of Levee Commissioners to assess and collect the tax. Persons charged with public functions, although created into corporations, ought not to lose the power to act by the death of members. The corporation is not created for private purposes only, it is for public utility. Hence, institutions of this kind are not to be controlled by reasons which might apply to private corporations, and it would be unreasonable to apply the same rules to such; for in the one case, they work injustice, in the other they are in harmony with justice. In Bacon vs. Robertson, 18 H. 480, this court placed the ordinary corporation in case of dissolution on a new and firm basis, and carried into effect what had always been understood as the Louisiana law on the subject, and gave the creditor the assets of the defunct corporation, just as he would have received his *pro rata* from a natural person's estate.

See Davis vs. Robertson, 11 A. 754, No. 1.

But a dissolution of a civil public corporation created for a single purpose, as the leveeing in or drainage of a section of country for the protection or benefit of the land holders subject to overflow, would not, after the work was accomplished, be just to the creditors unless they were protected by the appointment of a receiver to collect the taxes or in some other way.

If the Legislature had authorized a company of private persons to build the levees, and had authorized an assessment on the lands to pay the company, on the dissolution of such a company, the courts of Louisiana would appoint a receiver and authorize him to collect the taxes, as was done by the court for Mr. Roselius, in the case of the New Orleans Draining Company.

See Davis vs. Robertson, 11 Ann. 754, No. 1, just cited.

Why should not the court, in the other case, also prevent a failure of justice by appointing some one to call in the debts erroneously called taxes. Those on the land require no assessment. They were fixed ("imposed") by the law itself, (under which the contractors were acting,) *at ten cents per acre specifically.* The contractor doing the work acted on the faith of the law, and the alluvial planter, with delight and with an agreeable sense of security, saw the contractor spending his money and labor until the work was complete. Then it was that the idea of defeating the right of the contractor was first thought of, and the Board of Levee

Commissioners was superseded by the Police Juries of Madison and Carroll. Acts 1861, page 110, page 118.

In the parish of Madison, the most of the responsibility is thrown on the Police Jury, who appoint the officers (Acts 1861, page 118,) and the Police Jury were to collect the taxes and appoint the collector. Page 119, section 8; page 120, section 15. In Carroll, a Board of Levee Commissioners, without being created into a corporation, had full control of the levees. *Levee tax payers* were authorized to vote.

In this case, the Legislature shows what it meant by allowing the Levee Commissioners to elect successors. It says, Acts 1861: "If any of the Commissioners appointed or elected under this Act should refuse to act or should resign or die, then, and in that event, *the remainder* are hereby authorized to select another others, etc." Acts 1861, page 110, section 3.

And so also the original Act of 1853, in reference the law of the Levee Board of the whole district, enacts: (p 45, section 11,) "that if any of the Commissioners elected under this Act should refuse to act, or should resign or die, then, and in that *event*, THE REMAINDER shall and are *hereby authorized to select another or others, to supply the deficiency, who shall hold his or their seats until the next regular election.*"

This clause has never been repealed, and must be considered still in force.

By the 17th section of the same Act of 1853, page 86, the Board was continued in office until their suc-

See Davis vs. Robertson, 11 A. 754, No. 1.

But a dissolution of a civil public corporation created for a single purpose, as the leveeing in or drainage of a section of country for the protection or benefit of the land holders subject to overflow, would not, after the work was accomplished, be just to the creditors unless they were protected by the appointment of a receiver to collect the taxes or in some other way.

If the Legislature had authorized a company of private persons to build the levees, and had authorized an assessment on the lands to pay the company, on the dissolution of such a company, the courts of Louisiana would appoint a receiver and authorize him to collect the taxes, as was done by the court for Mr. Roselius, in the case of the New Orleans Draining Company.

See Davis vs. Robertson, 11 Ann. 754, No. 1, just cited.

Why should not the court, in the other case, also prevent a failure of justice by appointing some one to call in the debts erroneously called taxes. Those on the land require no assessment. They were fixed ("imposed") by the law itself, (under which the contractors were acting,) *at ten cents per acre specifically.* The contractor doing the work acted on the faith of the law, and the alluvial planter, with delight and with an agreeable sense of security, saw the contractor spending his money and labor until the work was complete. Then it was that the idea of defeating the right of the contractor was first thought of, and the Board of Levee

Commissioners was superseded by the Police Juries of Madison and Carroll. Acts 1861, page 110, page 118.

In the parish of Madison, the most of the responsibility is thrown on the Police Jury, who appoint the officers (Acts 1861, page 118,) and the Police Jury were to collect the taxes and appoint the collector. Page 119, section 8; page 120, section 15. In Carroll, a Board of Levee Commissioners, without being created into a corporation, had full control of the levees. *Levee tax payers* were authorized to vote.

In this case, the Legislature shows what it meant by allowing the Levee Commissioners to elect successors. It says, Acts 1861: "If any of the Commissioners appointed or elected under this Act should refuse to act or should resign or die, then, and in that event, *the remainder* are hereby authorized to select another or others, etc." Acts 1861, page 110, section 3.

the law of the case.

And so also the original Act of 1853, in reference to the Levee Board of the whole district, enacts: (page 45, section 11,) "that if any of the Commissioners elected under this Act should refuse to act, or should resign or die, then, and in that *event*, THE REMAINDER shall and are *hereby authorized to select another or others, to supply the deficiency, who shall hold his or their seats until the next regular election.*"

This clause has never been repealed, and must be considered still in force.

By the 17th section of the same Act of 1853, page 86, the Board was continued in office until their suc-

cessors in office should be duly *elected and qualified.* They were also continued in office by the Act of 1855, Philip's Digest, page 395, section 2, and article 125 of the Constitution of 1852, and by the tenth section of the Act of 1859, section 10. Acts 1859, page 15. This latter Act erected them, as we have already seen, into a corporation.

The act of 1867, page 265, recognized their existence, and the *tenth* section declared, "that the provisions of this act are not to be understood as impairing or limiting any powers, rights or duties of said Board of Levee Commissioners." See case of Board of Levee Commissioners vs Harris, 20 Ann. 201, in 1868, wherein the Board were collecting penalties.

A. This legislation presents the question whether the judge *a quo* did not err in refusing to order the three Commissioners, *the remainder*, to proceed and fill the vacancies in the Board, in order to assess the tax, as the most convenient mode of executing the judgment.

The Circuit Judge thought that "the three survivors above named did not constitute *a quorum* or a majority, and are incapable of filling vacancies; "but it expressly confers power on the *remainder* surviving or not resigning to fill the vacancies; [Record, page 52;] and to say that language so explicit is to be restricted, is to legislate and not to interpret according to the legislative rule of construction, which says, art. 13 C. C.: "Where

a law is clear and free from ambiguity, the *letter is not to be disregarded*, under the pretext of pursuing its spirit."

The act giving power to the *survivors* or *members* remaining after resignation to fill vacancies, was drafted, no doubt, by residents of the district subject to inundation, and they knew what was needed.

The people in a district subject to overflow are like people in a besieged city surrounded by a sleepless enemy, seeking entrance at every unguarded point and carrying consternation and destruction through every breach. No one who has not lived, during high water, behind the levees, and seen with what watchful anxiety every threatened point, whether from caving banks, the splashing over of steamboat waves, or that still more dangerous and hidden foe, the crawfish, which so often tunnels the levee with its cells, is examined by the inhabitants, or who has not heard the roar of the rushing waters and seen the destruction of stock and of the labors and habitations of man by a crevasse can well understand the necessity of promptness, energy and decision in averting an overflow.

Madison and Carroll Parishes are over four hundred miles from New Orleans, and when these acts were first passed by the Legislature, there was no telegraph line at all in those parishes, and communication with New Orleans was received by steamboats, and except at one point it is still imperfect. Hence, there was no means equal to the necessity of the case of having vacancies

filled by the executive, and it was intended by the Legislature, no doubt, to place it in the power of the "*remainder*" of the Board who were on the ground where the danger was to be encountered to act promptly and at once fill the vacancies. The necessities of the case, the safety of the people, required that the power to fill vacancies promptly should reside somewhere near the danger, and the Legislature lodged it with the "remainder" of the Board. It does not say where the remainder shall reside. It does not require that the remainder shall reside in the two parishes, and it does not say that the *remainder*, provided they be a quorum, may fill vacancies. It has no such proviso and no such restriction. Our adversaries stickle for the letter of the law on other branches of our case when it suits their convenience, and we do not think they can take with any success opposite ground now, nor can they easily show any other law which can deprive this clear language of the Act of its full force. The common law in regard to the English borroughs surely does not apply, and cannot restrain the Louisiana statute.

We think it is clear beyond question, if the Louisiana laws are of any force, they should be interpreted by the rules given for that purpose, and that neither a majority nor any other number of the Board of Levee Commissioners are required to constitute *a quorum* in order to fill vacancies, and that the Circuit Court erred in holding, that in order to fill vacancies, the survivors must be a majority and reside in different parishes.

In meritorious cases, the law ought not to be restricted and words added to its letter, where the effect of such addition is to defeat the purposes of justice and the law itself.

It was in the power of the Circuit Court to have ordered the surviving members, the "*remainder*," to proceed and fill vacancies, and proceed to the collection of the taxes.

To our minds, the error in this branch of the case is manifest.

B. Under the equitable provisions of the Louisiana law, we think the remaining Commissioners, if the court should deem advisable, could be ordered to assess and collect the tax, or the Marshal might also be appointed to do that duty; because, unquestionably, the courts of Louisiana, under the law as it existed when these warrants were executed, would have granted the relief in this form if required, and if it appeared the most convenient.

This case, we have already observed, is entirely different from Heine vs. The Levee Commissioners, 19 Wall., 657. The suit is at law, and is brought upon the original levee warrants for the work actually done upon the levees, whereby the land holders were enriched far beyond the money expended, and the *equivalent for the debt was transferred directly to the owner of the alluvial lands, and was never lodged* for a moment in the hands of the corporation, the agent. A judgment

at law was obtained; three or four executions issued and were returned unsatisfied. Hence, the very course had been taken, which this court has since said, in the case of Heine vs. The Levee Commissioners, was the true and proper course. 19 W., 657, 660.

The obligations in that case were bonds, created under a special act of the Legislature, and a different rate of assessment was made, and the DISTRICT *Judge* AND RECORDERS WERE TO ASSESS the tax for the payment of the bonds. See Acts 1859, page 14, sections 4 and 5, page 15, section 10.

The tax on the land, by the Act of 1858, is "a special tax of ten cents on each and every acre of alluvial land annually." It is true, that it was nominally to be assessed by the Board. But this assessment could only mean that the Levee Board, annually or whenever there was necessity, were to make out a list of the taxes so far as the land was concerned. Acts 1858, page 129.

That this is the construction is the more apparent from the third section. The Act says: "The tax *herein imposed*," (not the tax to be assessed by others, *but herein imposed*, that is, by the act itself,) shall be a first lien and privilege upon the land subject to the same.

It was upon the strength of this law that the levees were built, and that law became a part of the contract, and it ought not to be in the power of the Legislature or the tax payers, whose agent the Board was, to enrich themselves at the expense of the man or men who

built the levees on the faith of the laws which they had made.

The necessity of the tax is shown by the judgment and the execution unsatisfied. *That* is demonstrated by a judicial authority.

The amount of the tax on the land. (which was a virtual pledge for the payment of the contractor) *was fixed* ("imposed") by the act itself on the land at *ten* cents on each acre.

The Louisiana courts would not, at that time, have withheld relief.

The Louisiana equity, as declared by the Code, would have supplied the remedy, if the acts had not been sufficiently explicit.

Templeton vs. Morgan, 16 Ann. 441.

Ray's Rev. Stat. page 139, sec. 2747, already cited.

Acts 1853, page 234.

Our courts go very far in supplying defects, by applying remedies within the spirit of the law, or as this Court has better expressed it: "A case may be within the meaning of a statute and not within its letter, and within the letter and not within its meaning"

The duties of the Board of Levee Commissioners, in regard to the levees, was only *one* of the many duties confided to the Police Juries by the general law, and the act of 1861 restored the power, merely allowing the Board to collect the tax and pay the debt. The State Court, in such case, can *order the sheriff or tax collector to collect* the tax to pay the debt. Rev. Statutes

1867, page 485, sec. 2450. Their power is extensive. See Watts vs. Police Jury of Carroll, 11 Ann. 141. Gillespie vs. Parish of Concordia, 5 Ann. 403.

If the sheriff can be ordered to do the duty, why cannot the Marshal be ordered?

C. If the acts of the Legislature of 1861 and the Constitution of 1868, and the death of Sutton have destroyed the Board of Levee Commissioners, so that it cannot be revived then, and in that event, the powers, duties and obligations of the Board have fallen back again into the hands of the Police Juries of the two parishes of Madison and Carroll, as the Legislature has affirmed in the act cited.

And this presents a very interesting question. Municipal and political corporations are in some sense the creatures of the Legislature; and the question is, can the Legislature, by dividing an old corporation into two or more new ones, destroy the debts against the old corporation, or do the new representatives of the old corporation, exercising the same powers and representing the same tax payers, become responsible for and bound to the creditors for their respective shares of the same debt?

If the Constitution protects municipal debts, which seems to be clear, it is difficult to see why the tax payer shall escape his indebtedness by the mere change of the agent. For as it respects the so-called tax payer residing within the Levee District, and protected and enriched by the levee, the indebtedness appears almost at first blush.

If we take some isolated plantation for example, and a *negotiorum gestor*, or some one under an informal contract, or without any contract, should build a levee which secured the place from overflow and saved the crops, such negotiorum gestor could unquestionably recover by a direct action. No civilian would doubt this proposition.

Dig. Lib. 3 Tit. 5, lex. 2.

2 Zachariae 68, sec. 427, seconde partie, Brussels Edition.

Civil Code [1825] Arts. 2272; also, 2130, 2131; and Arts. 2292 to 2299 of Code [1870].

Police Jury vs. Hampton, 5 N. S. 396–399.

O'Reilly vs. McCleod, 2 Ann. 147.

O'Reillp vs. Oakey, 4 Ann. 22.

Police Jury vs. McDonough, 10 Ann. 395.

Garland vs. Scott, 15 Ann. 144.

Now, how can it make any difference whether there ~~there~~ were two places inclosed by a levee and two men and plantations protected instead of one? They are each benefited, and each proprietor is enriched. Suppose ten plantations are benefited or one hundred, is not the principle the same, and is it not as true of the one hundred as it is of the one, that "the the value of the work is a proper standard by which to measure the benefit to the proprietor? *The work being useful and necessary*, equity forbids that the defendant shall be enriched at the expense" of another. 10 Ann. R. 395.

The nature of the benefit, then, does not change when the ten, or one hundred, or one thousand planters employ a single agent to make contracts for the building of their levees. And in this respect the case, as we have observed elsewhere, is very different from the expenditure of money by a municipality for its government and the payment of its mayor and other officers. For in such cases there may be some persons, such as strangers owning property, who are not benefited; but here all persons residing behind the levees are protected, and all personal property is saved from destruction, and lands are increased in value by the levees many fold more than the cost of the levees.

We therefore reiterate what has been proven heretofore, that the holder of property in the alluvial district is in equity the debtor, whether he be represented by the Board of Levee Commissioners or the Police Juries of the parishes. It must then follow that when the Board of Commissioners are legislated out of existence, the other political bodies over the same territory are substituted in their place.

The power which was given to the Board of Levee Commissioners was of a similar nature to that exercised by the Police Juries under the old laws in reference to the levees, and essentially the same as that exercised by all the Police Juries in the parishes above Red River, if not throughout the State at large.

The doctrine of this court is, that the State can no

more impair the obligation of contracts made by politieal corporations than any other contract.

See Van Hoffman vs. City of Quincy, 4 Wall., 549.

Butz vs. City of Muscatine, 8 Wall., 584.

Dillon Municipal Corporations, secs. 114, 115.

Curran vs. State of Arkansas, 15 H, 312.

2 Kent, Ed, 1854, page [307,] note a.

Cooley on Constitutional Limitations, 289, 290, 292.

Hawthorn vs. Caleff, 2 Wall. R. 10.

Contracts cannot be violated by a State Constitution,

Jefferson Branch Bank vs. Shelley, 1 Black 435. No. 7.

Davis vs. Gray, 16 Wall. 232.

Dwarris Statutes, page 477.

Will it, therefore, permit the Constitution to be defeated and evaded by the mere change of name, and the snbstitution of one agent for another?

Take the city of New Orleans. On the 8th day of March, 1836, the city of New Orleans, which up to that time was a city with one common council and one common government, and large debts against it, was divided into three independent municipalities, with separate corporate existences, with power to collect taxes, sue and be sued, etc., for all things concerning their respective portions of the city. See Acts of 1836, page 28. Section 1, page 30. Section 2, page 31 Section 4.

The Act provided for the payment of the city debts by the respective municipalities, according to "the basis

of the amount of taxes and other revenues, accruing to each corporate section aforesaid." Page 34, section 15.

If this provision in the Act for the payment of the debts had not been made, would not the Constitution of the United States have enforced the old city debts against the three municipalities? They represented the same people, the same interest, and exerted the same power. They succeeded to the old city by an universal title. By the principles of the civil law which are applied to municipalities, States and sovereignties; by the laws of nations, whoever succeeds to the municipal rights of another becomes bound for his debts.

In the language of Wheaton (International Law, Ed. 1866, section 30):

"The debts being contracted in the name of a State by its authorized agents for its public use, the nation continues liable for them, notwithstanding the change in internal constitution. The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations of the former government. It becomes entitled to the public domain and other property of the State, and is bound to pay its debts previously contracted."

Hereditas *nihil aliud est quam successio* in universum jus quod defunctus habuerit. Digest, lib 50, T. 17. Lex. 62. See Mackeldy. Partie Speciale, Brussels Ed. sections 631, 633. Ibid. Section 765, IV, No. 2.

What difference is there, then, in the succession to a

municipality? It succeeds to the same rights, and represents the same people and interests as the former.

But it is not so with other corporations. The new bank or insurance company, or university, although bearing the same name, is not the old company, nor entitled to succeed to its rights unless authorized to do so by law, or some transfer from the old company.

With a municipal corporation, the new one is the same as the old, no matter how it is changed as to its form of government, nor what name is given. A change of charter of New Orleans every year or two, with different council or aldermen, or administrators, has not been understood to change the identity of the city, nor relieve it of its old debts.

The new municipal corporation must represent the same interests as the old, and hence, there is no change of identity. Divided into parts, they represent the whole as before; united to another, it still represents the same.

If the inviolability of obligations is guaranteed when due by political corporations by the Constitution, it cannot be guaranteed in any other manner than by considering the case in this light.

New Orleans owes over $20,000 000. Can the State relieve her of that great and exhaustive burden by dividing New Orleans into three or four municipalities, (as was done in 1836,) by making no provisions for the payment of the old debt?

If it can be done, it will not be long before the at-

tempt will be made in some place to relieve over-burdened towns, and if a State can scale down its own indebtedness, it will be found very convenient, and pretences enough can be found to do the same thing with the towns and cities.

But we think that in all this class of cases, the courts have power under the Constitution, to adopt such a course as to prevent the impairing of the obligation of contracts. To dissolve a corporation in order to relieve the corporators of debt and enrich them, is as much an act impairing the obligation as a contract, as would be one to exempt its property from seizure.

Von Hoffman vs. The City of Quincy, 4 Wall. 428.

In the case of private corporations, this court, as we have already seen, adopted rules differing from the common law, and in accordance with the principles of the civil law, as more in accordance with equity, and it can distinguish those corporations which are created for meré purposes of police and government from those which have the double purpose of protecting persons and property, and increasing the value of the latter.

The case at bar originates, we repeat, under the jurisdiction of the civil law, which, in all universal successions, throws the debts upon the successor, and which commands its judges, by one general legislative precept, to render justice through no special legislative act, has pointed out the mode. This legislative precept, as we have endeavored to show, is as obligatory as any other precept, and it supplemented all defi-

ciencies in the laws which made part of the contract sued on. Dillon says, Municipal Corporations, ed. 1872, sec. 114, page 157: "As it respects the *creditors* of municipal corporations, their rights are protected from legislative invasion by the Constitution of the United States, and no repeal of a charter of a municipal corporation can so dissolve it as to impair the obligation of a contract, or it may be safely added, preclude the creditor from recovering his debt."

The court says, in Van Hoffman vs. City of Quincy, 4 Wal. 554: "It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other."

In Louisiana the dissolution of a corporation does not dissolve the debts due the corporation, but they may be recovered by a receiver, who may be appointed by the court where the statute law has failed to provide a special remedy.

Chief Justice Eustis, as the organ of the Supreme

Court of Louisiana, in State vs. Burk, 5 Ann. 740. "We do not understand the law to be, as contended for by counsel, that in the dissolution of a corporation the personal property vests in the State, and *the debts* due to and from the corporations cannot be recovered. *On the contrary*, by the civil law, on the dissolution of corporations of this class, the property of the corporation belongs to its members and must be divided among them." 5 Ann. 741.

The Chief Justice, in Davis vs. Robertson, 11 Ann. 754, said: "Under our legislation, we believe that the debtor of a corporation has never been considered discharged from his obligation by the forfeiture of the charter of such institution. Indeed, our courts have, under their equitable powers, appointed (when necessary) a receiver to collect the debts due to such defunct corporation, for the purpose of paying the debts due by it." Davis vs. Robertson, 11 Ann. 754.

A corporation created for a single purpose, like the Board of Levee Commissioners, who receive no advantage themselves for the labor expended by the levee contractors, but are the mere agents of the land owners who do, although they have received and exercised all of the powers usually given to a political corporation, yet must be considered more in the nature of a private corporation for the local advantage of certain persons who are to be enriched, and themselves become the real debtors for the money expended on their account. The lands of these people, by reason of the

labor expended on the levees, arose in value, (when cultivated,) enormously, in the interior of the parishes, say from one dollar and a quarter to sixty, eighty and one hundred dollars per acre where they had made some improvements. Thsse tax payers owed the debt incurred to enrich them and protect their lands, and in equity and bono conscientiae *they honestly owed the levee contractor* for the money and labor expended on their account and to enrich them; and that, as we have seen, the Parish of Madison confessed in the intervention filed by it. (Record, page 7,) and the same is shown by the authorities cited.

This debt, thus due by the parties who were benefited and enriched, was, in equity, the pledge of the contractor, and he had a right to look to it for his payment. Under the laws of 1853 and 1858, the measure of the debts due by the tax payers was the amount expended on the levees for their benefit, and their liability was fixed by the work and labor done.

This debt, then, due by the tax payers and pledged to the contractor, was not annihilated by the said acts of 1861 and the division of the Levee District into two districts, represented by the Police Juries, and the death of said Sutton; for if a receiver could be appointed by the courts to collect the debt from the tax payers as fixed by law, much more can the Police Juries, on whom the same duties have devolved by the division of the Levee District, be compelled to cause

the taxes to be assessed, for they represent the tax payers as their agent, in this respect, precisely as the Board of Levee Commissioners did.

The question was considered in the case of Parker vs. Scogin, 10 Ann. 631. The *second* question was, whether a judgment confessed by the President of the Police Jury for one hundred thousand dollars on certain railroad bonds, where it was "DECREED that an assessment of taxes should be made and a collector appointed by the Police Jury to collect the taxes, and in *the event of a failure on the* part of the Police Jury to make the appointment, *a mandate should issue charging the sheriff* with the duty of assessing and collecting the tax."

The Court said:

"The nature of municipal corporations is such, that they, of necessity, represent all the citizens of the territory or district submitted to their jnrisdiction, *by classes as well as collectively.* As it would be impossible to conduct a proceeding against each and every inhabitant of a parish, *they are represented by their Police Jury.* If the Police Jury can represent the inhabitants collectively, it can represent them by classes for the same reason. So the Legislature not only represents the electors who have chosen the representatives composing the Legislature, but also all other classes composing the State, such as women, minors, naturalized citizens, denizens and aliens within its limits. So of a city. The municipal authorities, while they represent the

whole body of the citizens within the limits of the city, represent the same by classes; they represent the merchants, the draymen, the laborers, the mechanics, the physicians, the lawyers and the laboring men of all classes. So the Police Jury represents the tax payers by classes: those who pay taxes upon land as well as those who pay taxes upon slaves, upon movables. upon capital, upon employments, or those who pay merely the poll tax. A judgment, therefore, against the Police Jury, as the representative of a single class, must be as obligatory upon that class as a like judgment would be against the Police Jury as the representative of the whole. The effect of such judgment is, in this respect, precisely as that rendered against the administrator of a succession. It, the judgment against the administrator, binds not only the heir of full age, who is *sui juris*, but the married woman, the emancipated minor, the minor heir, whether with or without a tutor. The judgment of the District Court must, therefore, be held obligatory upon the plaintiffs. In the absence of an appeal or action of nullity, it is obvious that no irregularities in the form of the proceeding before the District Court can be inquired into, after one year has elapsed from the rendition of the judgment. If the Police Jury was regularly cited, or made its appearance, no inquiry can now be entertained, whether the power to confess judgment was or was not formally conferred by sufficient authority."

11 Ann. 631, 632.

See also Kennard vs. Lafargue, 23 Ann. 168.

At the time the judgment was rendered against the Board of Levee Commissioners, they stood, as respected the tax, in the place of the Police Juries, and the judgment against them bound every tax payer in the Levee District, and no writ of error having b en taken from that judgment, it is conclusive, and cannot be questioned by any one, and much less by the Police Juries who have diligently fought the case from the beginning.

If the death of the President, Sutton, under the Acts of 1861 and the Constitution of 1868, extinguished the corporation, then all its duties, power and obligations, by the general law, are vested in the Police Juries. They were placed over the same jurisdiction, and they represent all the tax payers who owe the plaintiffs this money. They can, therefore, be ordered to proceed to the assessment and collection of the taxes. The respective assessments from the Auditor's office, which are identified with the bill of exception, readily show what part is to be paid by Carroll, and how much by Madison. There is no trouble in the apportionment of the tax assessments to each parish, for the authentic assess ments from the Auditor's office (Record, pages 53-55,) show the *pro rata* of each parish. The Police Juries have the power to collect the tax under the general law.

If the position we have taken is true, that the new municipal corporation succeeds to the duties and obligations of the old, and if it be true, as we have argued, that the Constitution of the United States protects the

obligation of contracts made by municipal corporations and quasi municipal corporations, as well as all others from violation, then the mandamus *ought to issue against the Police Juries.*

But it was contended, that in the court below, that the corporation being a political corporation, it could be abolished by the Legislature, and that the law creating the Levee Board was actually repealed by the Constitution of 1868, etc, and especially by the Act of Feb. 20, 1871; Acts 1871, page 29, 64; and that parties contracting with municipal corporations know that they may be repealed at any time, and that such repeal of the act of incorporation does not destroy the debt, which exists just as it would against a dead man. In the case of the dead man, his goods which were bought with the creditor's money survive him, just as the assets of a bank, an insurance company, exist after its dissolution.

In this case, however, the money of the creditor was not expected to be represented in the assets of the company, but only in the debts due by the tax payer, the debtor who, ex equo et bono, primarily owed the debt, and to *whom above all, parties* looked for payment and security, and the act of the Legislature providing for the payment thereof became a part of the contract, and to repeal the law to defeat the contract, as we have already observed, is a violation of it.

Had the matter been left with the Police Juries to make the contracts for building the levees, they could

not have made them without providing in the ordinance for the payment of the debt. Acts 1853, page

Revised Statutes 1856, page 345, sections 4 and 5; Police Jury vs Britton, 15 Ann. 569. When such provision is once made, it "shall remain in full force until the debt and interest is paid." Sec. 5.

The act of the Legislature fixing a specific tax of ten cents on each and every acre of alluvial lands and an ad valorem tax not to exceed three hundred per cent. on the other property, provided for the payment of the debt about to be created as a pledge to the contractors who were to do the work. It required no directions to the Board of Levee Commissioners, because the act made the provision itself. As the third section of the act says, the tax is *imposed*, and it was done in conformity with the spirit of the Constitution of 1856, which prohibited the Legislature from creating a debt of over $100,000 without making in the same manner provision for its payment, and such provision of law was irrepealable. Const. 1852, art. 111.

Such being the Constitution under which the acts of 1853 and 1858 were passed, it is clear that it must be left with the courts to inforce the provisions of the law and constitution for the sureties of the creditors after a repeal.

And the act of 1858, under which the contracts were made, is within the spirit and intendment of the act of 1853 and art. 111 of the Constitution of Louisiana as to the continuance of the old law, even after repeal.

But in the event of these necessary agents acting for the tax payers and not themselves, the repeal of an old law and the immediate re-investment of two other corporations in the place of the old ones, is a mere substitution of one person for another, and leaves the successors the debtors, and the debt, by the force of equity, is divided among the new debtors pro rata. We refer, also, to the following authorities:

Riggs vs. Johnson Co. 6 Wal. 166.

Butz vs. City of Muscatine, 8 Wal, 575, 884; 6 Wal. 189, 193.

Benton vs. Iowa City, 7 Wal. 313.

The Mayor vs. Lord, 9 Wal. 409.

Supervisors vs. Levant, 9 Wal. 415.

Amy vs. The Supervisors, 11 Wal. 136.

Dillon, page 646, section 693.

Comm'rs Knox Co. vs. Aspinwall, 24 H. 376.

Supervisors vs. U. S. 4 W. 435.

Von Hoffman vs. Quincy, 4 Wal. 535.

We understand, from these and other authorities, that the courts of the United States, after judgment, may avail themselves of the State remedies as fully as the State courts could.

The mandamus of the Code of Practice is a very efficient remedy.

"ART. 829. This is an order issued in the name of the State by a tribunal of competent jurisdiction and addressed to an *individual*, or *corporation*, or court of inferior jurisdiction directing it to perform some certain

act *belonging* to the place, duty or quality with which it is clothed."

"ART. 830. The object of this order *is to prevent a a denial of justice* or the consequence of defective police, and it should therefore *be issued in all cases* where the law has assigned *no relief by the ordinary means* and where justice and reason require that some mode should exist of redressing *a wrong* or an abuse of any nature whatever."

The court being seized of complete jurisdiction over the original case and having rendered a final judgment, which bound all the tax payers and landholders in the Levee District, the court can use the equitable writ of *mandamus* to enforce the judgment to the same extent that the State courts can, and it is needless to consume the time of the court to show that such cases as the Secretary vs. McGarrehan, 9 Wal. 298, and Graham vs. Norton, 15 Wal., cited by our adversaries in the lower court, are without application here.

We conclude, therefore, that the remedy which we pursue in this case is the one which this court has repeatedly sanctioned in other similar circumstances, and that—

1st. The Circuit Court erred in its said ruling that said Honoré P. Morancy, Thomas C. Bedford and John P. Cochrane, the surviving members of said Board of Levee Commissioners, were incapable of filling vacancies in said Board, and that said court, on the contrary, ought to have interpreted the acts of the Legislature in

this behalf as they read, and held that said remainder of said Board of Levee Commissioners had the power conferred by statute to fill the vacancies in their body, and they ought to have been ordered to proceed and fill vacancies and assess and collect the tax.

2d. That inasmuch as the acts respecting said Board of Levee Commissioners had virtually made provision for the payment of the debts then about to be created in the same manner as the Police Juries are required to do by the act of 1853 where they create debts, the provision was within the purview of the act, for it *imposed* the tax, and nothing more was required as to the land than to make a list of those liable to pay the ten cents an acre and collect it. And the act of 1869 became therefore applicable, and the Marshal, or some other receiver, might have been charged with their collection.

3d. If the letter of the act of 1853 is to be disregarded, and if the Board of Levee Commissioners has ceased to exist and this court should think it cannot direct the Marshal to institute proceedings to collect the lien "imposed" by law, then the said Police Juries have succeeded to the whole territory and represent all the tax payers, and the debts due for said levee warrants are due by the parishes respectively, as representatives of the tax payers; and the court erred in refusing to order said Police Juries to proceed to assess and collect the taxes to pay the same.

The case is a meritorious case, as the court can learn as a matter of history by reading Arthur's testimony,

Record, pages 45-47, which was excluded but came up with the record, as referred to in the bill of exception.

We feel confident that the case admits of a remedy; and that neither the efforts of the land holders who have been enriched with the money of the contractors, nor of the State authorities who are scaling down and repudiating debts can defeat it.

All of which is respectfully submitted by

E. T. MERRICK AND G. W. RACE,

for Plaintiff.

Supreme Court of the United States.

No. 81.

JAMES M. BARKLEY, Plaintiff in Error.

vs.

THE BOARD OF LEVEE COMMISSIONERS.

Additional Authorities by Plaintiff in reply to Defendants' Brief.

The objection raised here that W. Sutton was not formally cited is evidently an afterthought, and it was not thought worth the while to make at first. On the contrary, Sutton appeared and filed a plea, which was regularly tried and decided. He also answers on facts and articles. These answers are part of the pleadings.

Burket *v.* Hopson, 19 Ann., 489.

Walker *v.* Villaboso, 18 Ann., 705.

It is difficult to see how he could be in court more effectually. He submitted to the court the only defense he chose to make. He pleaded that he was not "president of the board of levee commissioners in the levee district in the parishes of Madison and Carroll, *and was not president at the time citation was served upon him in the above cause.*" (Rec., 20.)

"A man's own allegations on the record of a suit are the highest evidence against him."

De La Croix *v.* Previt, 6 M., 280, C. C., 2291.

"One is not, in contemplation of law, a party to a suit until he has either appeared or been cited to appear in it."

See Succession of Perry, 11 Ann., 198; 11 Ann., 195.

An action of nullity lies within one year, "if the defendant has not been legally cited, and has not entered appearance, joined issue, or had not a regular judgment by default taken against him."

C. P., art. 606; see also art. 357.
Gridley *v.* Conner, 4 Ann., 416.
Pochelu *v.* Kemper, 14 Ann., 308.
Boatner *v.* Scott, 1 Rob., 552.
Jones *v.* Bishop, 13 L. R., 398.

The main portion of the defendants' argument is directed to what counsel supposes were errors in proceeding. The same counsel who argue this case here represented the board of levee commissioners and the police jury, and filed the plea for Sutton, president of the board of levee commissioners, denying that he was president of the board. (Rec., p. 20.)

The final judgment was rendered June 13, 1872, *and has not been in any manner impeached by writ of error or otherwise.* On the contrary, it was relied on by defendants as merging the demands and as concluding the plaintiff. It does not seem advisable to argue the regularity of these proceedings further a second time, nor show the inapplicability of defendants, as was done in the court below.

The *writ of error is from the* judgment on the petition for a *mandamus* rendered 20th June, 1874, more than two years after the final judgment, and, as just said, no writ of error was taken from the original judgment.

The case cited by defendants' counsel of First Municipality against Christ Church, proves too much, for it shows that Andrew Hodge was authorized to appeal, although the judgment was against Christ Church. He stood in relation to the case much as the police juries do. (See case 3 Ann., 454.)

It is apparent enough that the case has been managed

by the counsel for the levee board and police juries in what they conceived the best manner to defeat our demand. They fought under Sutton's banner until they met their first defeat. They were victorious in the lower court under the commissioners Morancy, Bedford, and Cochrane, and the police juries, and ought not to be heard now to gainsay their previous acts and defenses.

The *plea of prescription* was argued by the police juries, and set down for trial, although objected to by plaintiff. After a trial the plea (which is a peremptory exception) was overruled. (See printed Rec., p. 34.) This was in 1873. No bill of exception was taken to the exclusion or introduction of evidence. The *facts* were thus found against defendants on the exception, and concludes the defendants. Thus the police juries have availed themselves of their position to contest the main action on nearly every ground, and the facts have been found against them. Document 10, found on p. 25, and brought up with a bill of exceptions by plaintiff, was part of the evidence on the trial of the plea of prescription.

The plea of *lis pendens* cannot avail defandants, because they are parties to the record, with a right to oppose the judgment. They stand towards the record precisely as Andrew Hodge did in the case of First Municipality *v.* Christ Church, (3 Ann., 454,) cited by defendant, and *lis pendens* must be pleaded *a limine litis*, C. P., 334, 335, 336.

The case of Basset *v.* The School Directors is cited as an authority against the power of the courts.

The school directors had no power to assess taxes *without the consent of a majority of the qualified voters* of the district after *thirty days' notice*. (Revised Statutes, 1856, p. 194, 195.) The courts could not compel the voters to vote for the tax. (See same case, Barett *v.* Barbin, 11 Ann., 672.)

The early case from Judge Martin, we think, has not been followed. (See Watts Templeton *et al. v.* Police Jury of Carroll, 11 Ann., 141.)

E. T. Merrick,
G. W. Race.

IN THE

Supreme Court of the United States.

No. 81.—October Term, 1876.

JAMES M. BARKLEY, Plaintiff in Error,

vs.

THE BOARD OF LEVEE COMMISSIONERS OF THE PARISHES OF MADISON AND CARROLL, AND THE POLICE JURIES OF THE PARISHES OF MADISON AND CARROLL.

BRIEF OF THE DEFENDANTS IN ERROR.

SAM'L R. & C. L. WALKER,

Counsel for Police Juries of Madison and Carroll.

WASHINGTON:
JOSEPH L. PEARSON, PRINTER,
Corner of 9th and D streets.
1876.

IN THE

Supreme Court of the United States.

No. 81.—October Term, 1876.

JAMES M. BARKLEY, Plaintiff in Error,

VERSUS

THE BOARD OF LEVEE COMMISSIONERS OF THE PARISHES OF MADISON AND CARROLL, AND THE POLICE JURIES OF THE PARISHES OF MADISON AND CARROLL.

BRIEF OF THE DEFENDANTS IN ERROR.

This suit originally was brought in the Thirteenth Judicial District Court of the State of Louisiana, holding sessions in and for the parish of Carroll, and was filed therein on the 23rd of August, 1867. It was a suit to recover $100,992.53, which with interest accrued, now amounts to something more than two hundred thousand dollars; the claim being based on certain choses in action, in the form of checks or drafts, payable to the order of certain payees therein named, and by these payees endorsed in blank against the Board of Levee Commissioners, a corporation composed of parts of the state, comprising parts of the parishes of Madison and Carroll, but a separate and distinct corporation, created by an act of the legislature of Louisiana, whose duties were the construction and repairs

of the levees, protecting the alluvial lands partly in both parishes. The suit was removed to the federal court, in July, 1871, under the act of March 2d, 1867. After its removal to the circuit court, the plaintiff by amended petition brought in the Police Juries of the several parishes of Madison and Carroll. The defendants in this case are the same as in the case of A. and M. Heine vs. The Board of Levee Commissioners of the Parishes of Madison and Carroll, reported in the 19th Wall., p. 655. These obligations were all drawn and dated at divers times, from February 5th, 1859, to May 1st, 1860, inclusive, and are all payable at sight to order of various parties, with the exception of eight of them, which were payable on the 15th of October, 1860, so that when suit was brought in the state court, more than seven years had transpired, which included the whole period of the war, beginning April 19th, 1861, and ending in Louisiana in the month of May, 1865.

By the law of Louisiana, actions on obligations of this class, "bills of exchange, notes payable to order, or bearer, except bank notes, those on all effects negotiable by endorsement or delivery, and on all promissory notes, negotiable or otherwise, are prescribed by five years, reckoning from the day when the engagements were payable."—(Revised C. C., Article 3540.)

On the 30th day of November, 1870, application was made to remove the case under the act of 1867, on the ground of prejudice, to the circuit court of the United States.

On July the 21st, 1871, the record was filed in the circuit court, and on the 7th of August, 1871, the plaintiff filed a supplemental and amended petition, in which he prays the citation of the Police Juries of the parishes of Madison and Carroll, and "that petitioners do have and recover judgment against the said Board of Levee Commissioners, as well as against the Police Juries of said parishes, on their several portions, etc."—(See Record, page 15.)

The petition as amended, as to the Police Juries, shows no ground of action as to them, no assumpsit of the obligation of the Board of Commissioners, no privity with its contracts on their part.

The parishes filed separate exceptions:

1st. As to the jurisdiction.—(Record, p. 19.)

2d. That the parishes were not parties to the contract.

3d. The prescription of five years and ten years.—(See Record, p. 21.)

These exceptions were referred to Justice Bradley for decision.—(Record, p. 27.) The opinion of Justice Bradley overruling the exception to the jurisdiction, without touching upon or deciding the question of prescription, was, it seems, omitted from the transcript of record, but may be found at page 256, Wood's C. C. Reports, 1. In that opinion, Justice Bradley, sitting as circuit judge, passing upon the question only of jurisdiction, said:

"Third. The defendants contend, that as to the parishes of Madison and Carroll, the action is an original one; that the judiciary act applies to them. If the original action was properly removed, and if the addition of third parties was a matter properly incident, I think the objection cannot prevail. But I cannot see how those Police Juries are proper parties in the case. I do not see how one corporation can be liable for the debts of another without a voluntary assumption thereof.

"But this is, perhaps, a matter more proper to come up on the trial of the cause, when the plaintiff may be prepared with evidence to show their liability. If the defendants' existence as a corporation has ceased, the plaintiff's judgment will be a vain thing."

No additional evidence of any responsibility has been adduced to show any connection between the two corporations, or any assumption of liabilities of these obligations, by the Police Juries of the parishes, or of any law of the state authorizing such an assumption since Justice Bradley rendered the above opinion; but, on May the 3rd, 1872, the plaintiff took a judgment by default against the Board

of Levee Commissioners (Record, page 26), and the default was confirmed on the 8th day of June, and on the 13th of June, 1872, a judgment was entered and signed against the said Board of Levee Commissioners, defendants (Record, page 28), leaving the cause untried, and resting with exceptions untried as to the Police Juries, and such is the present undetermined condition of the original cause as to these latter parties.

We wish now to call the attention of the court to the fact that the Levee Board not being represented, of course no defence appears on the record on the part of the extinct board. It was not until the Police Juries were drawn into the conflict that we could oppose the nullities and peremptory exceptions to the judgment set up against us.

"Peremptory exceptions founded in law may be pleaded at any time before definite judgment."—(C. P., 336.)

On the 19th day of July, 1872, a writ of *fieri facias* issued (Record, page 29), but the writ was returned unexecuted, William Sutton not being found, the plaintiffs failing to point out property to satisfy the writ.—(Record, pages 29, –30.)

On the 18th of October, 1872, an alias *fi. fa.* was issued (Record, page 31), and returned on the 15th of October, by order of plaintiff's attorney.—(Record, page 32.) On the 15th of November, 1872, a pluries *fi. fa.* was issued (Record, page 32), and returned by the marshal unserved, William Sutton, their president, having died.—(Record, page 33.)

On the 24th of January, 1874, the plaintiff filed a petition praying a peremptory mandamus, not only against the extinct corporation, the three individual surviving ex-members of the board, but also against the Police Juries of the parishes of Madison and Carroll.—(Record, pp. 38–41.)

To this extraordinary proceeding and demand, the following exceptions and answer was filed on the part of those surviving members of the late Levee Commissioners and the Police Juries, (Record, p. 42):

And now come H. P. Moraney, Thos. C. Bedford, and John T. Cochran, made defendants in this proceeding, and for causes why the writ of mandamus do not issue, do respectfully show:—

First. That this Honorable the Circuit Court is without authority in law to issue the writ of mandamus prayed for.

Second. That the said corporation is defunct or suspended, by resignation of the president and of your respondents, and by the death of William Sutton, late president of said corporation, before service of this rule *nisi*.

Third. That your respondents are incompetent to represent said corporation, because there is not a quorum thereof remaining, and the survivors are all citizens of the parish of Madison, whose terms of office expired by law on November 1st, 1862.

Fourth. That they were disfranchised and rendered ineligible to hold such office by the act of the Congress of the United States, approved March 2d, 1867, entitled "An act to provide for the better government of the rebel states," and by the act of said Congress supplementary to the act aforesaid, approved March 27th, 1867, and by act approved July 19th, 1867, supplementary to the two acts first mentioned, and defining the meaning and intent of same.

Fifth. That these respondents are incompetent to represent said corporation, having been disqualified, made ineligible to said offices, by the 99th article of the constitution of the State of Louisiana, adopted March the 7th, 1868, and their offices vacated by the *act of the* legislature of Louisiana, being act No, 39, of the year 1868.

And should the above grounds be deemed insufficient cause why the writ prayed for should not be issued, then these respondents further show:—

First. That this Honorable Circuit Court is without jurisdiction, because the record of suit No. 5456, from the Thirteenth Judicial District of Louisiana, for the parish of Carroll, from whence it was removed to this court, and numbered 6497 on the docket thereof, neither contains nor exhibits any evidence of the citation of William Sutton, alleged therein to be president of said corporation; that there was no appearance on the part of the said corporation, defendant in said suit, nor issue joined on the part of the

court below or in this Honorable Court, and that all the proceedings in this suit are *coram non judice*, and are null and void.

SECOND. That the judgment in the suit rendered, and attempted to enforced by mandamus, is absolutely null and void, having been rendered without citation; and,—

THIRD. Because said judgment is rendered on obligations which are void, and which were issued by said board or its officers without authority, and in contravention of law; and,—

FOURTH. Because the said pretended warrants or scrip, are prescribed by the prescription of five years.

And on the same day the Police Jury of Madison filed the following exceptions:

And now comes Alexander V. Brown, President of the Police Jury of the parish of Madison, and for exception and cause to plaintiff's demand and rule herein filed, respectfully shows:—

That there is a suit pending between the same parties, for the same object, and growing out of the same cause of action, before this court, which suit is yet not decided; wherefore, respondent pleads *lis pendens*, and prays this rule be dismissed at mover's costs.

And should this plea be overruled, and in that case only, your respondent shows that the Police Jury of the parish of Madison is another and different political corporation from the Board of Levee Commissioners, having no powers except those specified by law, and specially granted to them for especial purposes in the manner set forth in the law, and that they are not vested with power to assess and collect any tax to pay the debts of the Board of Levee Commissioners, or any other corporation than their own, contracted according to law; wherefore they pray to be dismissed hence with costs.

The laws referred to by the above respondents, the ex-commissioners, are as follows:

Article 99 of the Louisiana Constitution of 1868.—"The following persons shall be prohibited from voting and holding any office: All persons who shall have been convicted of treason, perjury, forgery, bribery, or other crime punishable in the penitentiary, and persons under interdiction. All persons who are estopped from claiming the right of

suffrage, by abjuring their allegiance to the United States government, or by notoriously levying war against it, or adhering to its enemies, giving them aid or comfort, but who have not expatriated themselves, nor have been convicted of any of the crimes mentioned in the first paragraph of this article, are hereby restored to the said right, except the following: Those who held office, civil or military, for one year or more, under the organization styled 'the Confederate States of America;' those who registered themselves as enemies of the United States; those who acted as leaders of guerilla bands during the late rebellion; those who, in the advocacy of treason, wrote or published newspaper articles or preached sermons during the late rebellion; and those who voted for and signed an ordinance of secession in any state. No person included in these exceptions shall either vote or hold office until he shall have relieved himself by voluntary writing and signing a certificate setting forth that he acknowledges the late rebellion to have been morally and politically wrong, and that he regrets any aid and comfort he may have given it; and he shall file the certificate in the office of the secretary of state, and it shall be published in the official journal," &c.

And the act of the legislature of Louisiana of the 20th August, 1868, as follows:

"AN ACT to ascertain the eligibility of persons elected or appointed to office, and to declare offices vacant when the persons elected or appointed are ineligible, and providing how such vacancies shall be filled, and prescribing a penalty for falsely taking the oath required by this act, and also a penalty for refusing to give up the books, papers, archives, and property of such offices to the person elected or appointed to fill the vacancies, and for obstructing or resisting the officer appointed to fill the vacancy."

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That before any person, elected or appointed to any office, state, parish, or municipal, in this state, shall be commissioned by the governor, (with a view to testing the eligibility of any such person to hold the office to which he has been elected or appointed,) such person so elected or appointed shall take and subscribe the oath or affirmation prescribed in the third section of this act."

The third section prescribes the form of oath which should declare the absence of any disqualication of the affiant, or give the assurance required by the constitution.

"SEC. 7. *Be it further enacted, &c.*, That in case commissions have been issued to any person or persons elected or appointed to office before the passage of this act, or if any person has been sworn in, or entered on the discharge of the duties of any office which does not require a commission, *all such persons shall take the oath* required by section three of this act, and file the same in the office of the secretary of state within thirty days after the promulgation of this act, and in the event of their failing so to do, the governor shall declare such persons ineligible to office, and their offices vacant, and the offices shall be filled as prescribed by the constitution and laws of this state."

Thus it is impossible to conceive that the board elected in November, 1859, to serve for two years, to wit, from the 1st of May, 1860, were members at the time of the services of the subpœnas in 1871, without ignoring the acts of Congress, the constitution of Louisiana, and the acts of her legislature made to put in effect the provisions of her organic law.

ARGUMENT.

We notice that the greater portion of the argument in our learned opponent's brief, is based upon what they urge as the considerations of *equity*, which they claim should induce this honorable court to supply the deficiency of law and to evolve a remedy by the forced application of laws *in pari materia*, in order to cause the land-owner of to-day to pay for some alleged benefit, which it is claimed was received by the land-owner of seventeen years ago, from portions of embankments then erected, which in most instances ceased to exist years ago.

Levees are as perishable as the wooden rail fences which surround the plantations, and in many localities are certainly less permanent.

In many instances the plantations themselves have ceased to exist by the result of the encroachments of the river, many of what were once the finest of plantations are now waste-lands, and the population of that section, in which the effects of the war and the emancipation were greater than in almost any other, has also greatly changed.

It will not be contended by plaintiff that the various acts of 1852, 1853, 1858, 1859, and 1861 contained any clause exempting the levee contractors or creditors of the Levee Board, if they claimed any lien or privilege upon the lands of the parish or the plantations upon which the levees were built, from the usual indispensable necessity of recording the same in the mortgage office of the parish.

Article 123 of the Constitution of Louisiana of 1868 expressly declares, though in fact the law thus stood before in regard to all liens other than a minor or married woman's mortgage, that—

"No mortgage or privilege shall hereafter affect third parties unless recorded in the parish where the property to be affected is situate. The tacit mortgages and privileges now existing in this state shall cease to have effect against third parties after the first day of January, 1870, unless duly recorded."

Not one-tenth of these alluvial lands referred to are to-day held by the persons owning them in the years 1858 and 1861.

A period covering from fifteen to twenty years sees many changes in the ownership of lands, even when such a period of time be passed in peace, with the system of agriculture and labor undisturbed; what changes, then, must these sixteen years have occasioned in these agricultural and extensive slave-holding districts, throughout whose fields were laid the scenes of many actual conflicts between contending armies, with the attending destruction inseparable from the fact of a section being the seat of war, besides the system of labor which constituted its wealth being swept away!

No portion of the country had its wealth and substance so completely annihilated as these particular districts.

It is a matter of public history that the main system of levees, or the series of embankments which formed the levee system, was destroyed during the four years of war, and at the conclusion there remained only disconnected portions of the line of embankments built in 1861, for the

building of only a very small portion of which the levee contractors may have accepted such warrants.

Such portions of levees as remained were in many instances unavailable for protection, as the constant changes in the course of the river, the caving of its banks in its bends, that it frequently occurs that this abrasion of the banks will, in even one or two seasons, eat up as it were so much of a plantation of hundreds of acres as to entirely destroy its value.

The Mississippi levee system is not permanent, and in the nature of things cannot be, and the levees have nearly all to be renewed or changed in line or supplemented by fresh works almost every year.

How, then, can the present possessors of these lands be called upon to pay an indebtedness for which they never received the benefit, and of which many of them never heard until these suits had gained a notoriety.

Many of the present owners hold under purchases made under foreclosures of mortgages and liens dating long prior to the building of these levees. Others under ordinary conveyances made in good faith and subject only to such mortgages, taxes, and encumbrances as were shown of record in the mortgage office of the parish.

As to any present owner of these lands deriving any benefit by which he should even equitably be liable to pay a tax, there are but very few, if any, who derive any benefit from ruins and remnants here and there of the old line of embankments, of which only isolated sections could be made available by being supplemented by new works, and such instances of indirect benefit are, indeed, very rare.

It was the duty of the creditors contracting with the Board of Levee Commissioners, not to give it unlimited credit, but to hold their accounts for work done, to see that they were paid out of the funds then collected or in process of collection by the taxes upon those persons and land-owners who received the benefit.

This, in the contemplation of the law-makers, was suffi-

cient. It fixed the rate of taxation as adequate to the requirements, and did not authorize the corporation to contract debts to build levees when it should be without funds, nor to issue negotiable paper *ultra vires.*

No where does any one of the various enactments authorize the emission of such currency as is here sued on.

The only act authorizing a credit transaction is that of the 10th March, 1859, where the legislature, after the disastrous floods of 1858, provided for the issuing of $400,000 of bonds, wherein the form of the bond itself was specified in the statute. This was the only occasion and was for a specific purpose.

It is urged, on page 4 of plaintiff's brief, that the board became the *agents of the land-owners.* If this theory be correct, then it would be true only in that the agency was of the land-owners of that period, the persons and property of the latter consisting in great part of slaves and movables; and the board could not be considered the agents of the present land-owners of to-day, between whom and the board's creditor there is no privity of even an implied contract.

The present owners of land in the parishes of Madison and Carroll, who owned the same land seventeen years ago, are few indeed in number, for ten years ago the war left the entire tier of parishes fronting the Mississippi a land of destruction and desolation, and the lands of the wealthy planters soon passed into the hands of their merchant creditors, or were sold at a tithe of their former value, and have been resold and acquired in good faith by persons, whites and freedmen, many of whom perhaps never heard of a Board of Levee Commissioners, nor of levee warrants.

If the warrants, being taken for a debt, which plaintiff states was a tax claim upon the lands and property, then by preferring the credit of the board and then electing to substitute for the same its negotiable paper, the debt changed its character, and they having chosen to assume the risk inherent in the credit, the original holders of these

warrants or this scrip cannot complain of the death of the debtor, nor of the destruction of the debtor's resources.

It is true, as counsel state on page 10 of plaintiff's brief, that all *choses in action* are transferable in Louisiana by contract, and the transferee acquires the legal title as it existed, and subject to the equities at the time of the transfer. But when the creditor has a claim of a certain nature and changes the form of his claim by substituting in its place negotiable paper, it is a NOVATION of the debt.

Novation takes place in three ways:

"1. When a debtor contracts a new debt to his creditor, which new debt is substituted to the old one, which is extinguished."—(C. C., art. 2,185.)

Article 2,195, C. C., says:

"The privileges and mortgages of the former credit are not transferred to that which is substituted to it, unless the creditor expressly reserved them."

In this instance the creditors or levee contractors, as they *novated* their debt by taking drafts or negotiable paper as a substitute for their claim, being at the time perfectly satisfied as to the new contract extinguishing the old one, preferring the *credit* of the board, which was sufficient for the passing current of such paper, and thereby accepted the risk inherent in commercial transactions, they or their transferees cannot complain if that risk eventuated a loss. They made no reservation, as article 2,195 required, in case they were inclined to reserve their mortgage lien, or privilege, without which the transferee could inherit no lien, and could only have acquired it by an express agreement thereto called a SUBROGATION and in writing.

Impressed with the importance of the issues involved in this suit, the magnitude of the amount involved being more than $200,000, behind which lurk other judgments and other demands which reach more than a million, and that a decision unfavorable to our clients would operate the confiscation of a tenth of the best and richest alluvial lands in our state, and would be fraught with utter ruin to

the inhabitants of the parishes of Madison and Carroll, we most earnestly crave a full, careful, and particular examination of the law and authorities herein cited.

It is indispensable to a proper decision of this suit that the court deciding should have a thoroughly familiar knowledge of the pleadings as they are presented in the record, and a thorough conception of the law of the State of Louisiana, which applies to the facts shown in the record. This case has been partially argued at various stages of progress before three different judges, and as a whole, it seems to us, with the profoundest respect, be it said, that the facts presented by the pleadings and the law of Louisiana may not have been perfectly apprehended by the court *a qua*.

Let it then be noted by the court that this suit was first brought in the Thirteenth Judicial District Court of the Parish of Carroll, State of Lousiana; that it was brought against a corporation on certain obligations, of which the circuit court of the United States has not original jurisdiction, but are of that character, the jurisdiction over which is prohibited by the proviso contained in the 11th section of the judiciary act of 1789. Judge Bradley says in his opinion, "this is undoubtedly so," but he maintained the jurisdiction, on the ground that the act of 1867 permitting causes to be removed on grounds of prejudice, overrides the proviso in the 11th section of the act of 1789. We beg the court to note how it came to take jurisdiction of this case, because it is, in the strictest sense, a Louisiana contract, subject to none other interpretation than that given by her laws, particularly as to what constitutes *due process of law*. If a federal court ignores the law of Louisiana in the decision of this case, as to what is established by her code as necessary to bring a party defendant into court as a necessary basis of a valid judgment, it would be legislating another process than that provided by the laws of the state under which the contract is made, and in the end, if the judgment be forced to execution, it would be depriving the citizen of his property *without due process of law*.

In the case of Rees vs. Waterton, the United States Supreme Court lately declared that—

"The proceeding supposed would violate the fundamental principle contained in chapter 2 of the Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law, that is, he must be served with notice of the proceeding. Due process of law, it is said, undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."—(Ibid, pages 4 and 6 of the decision.)

Keeping, then, in mind the manner in which this case came into this court, by removal from a state court, with all its imperfections on its head, and when we consider the language of the act of Congress of March the 2d, 1867, "that when a suit is *pending*, or may hereafter be brought, etc.," the fact of the *service* and the manner of its bringing is important to be known in order to determine whether the condition of the case at the time of its removal from the state court brings it within the purview of the act of 1867, for if a want of jurisdiction in a court of the United States comes to the knowledge of the court in any way before trial, it will not proceed.—(Herriot vs. Davies, 2 W & M., 229.)

"Want of jurisdiction of the subject-matter can be taken advantage of at any stage of the cause, but want of jurisdiction over the parties is waived by appearance and pleading to *issue*."—(12 Pet., 657.)

"Want of jurisdiction may be taken advantage of by motion *in arrest of judgment*."—(Sheddin vs. Custis, 6 Cal., 241.)

"A judgment and subsequent proceeding had in a circuit court or district court, which are void for want of jurisdiction, may be vacated upon motion in the same court, notwithstanding the expiration of the time at which the judgment was rendered."—(Shuford vs. Cain, 1 Abbot, 302.)

If, then, we show that the Board of Levee Commissioners, *the sole defendants* in the state court, were not cited,

as required by the law of Louisiana; if we show that no default could lie against them to form a tacit issue without proper citation; if we show that no appearance was in any manner made for said corporation by counsel, or by any officer of the corporation, in the state court, the pronouncing of judgment in such case is irregular, illegal, and a nullity on the face of the record, by the law of Louisiana and that of the United States. That such is the fact in this suit we will show from the record itself beyond the possibility of a doubt.

1.—Want of Citation.

By the law of Louisiana (and we presume it to be the case in every civilized country), "The joining of issue is in fact the foundation of the suit, as citation is that of the action; it is only *after this is done that the suit begins.*"—(C. of P., art. 359.)

The Supreme Court of Louisiana said: "But the first ground which presumes a want of proper parties to that suit, and the consequent non-existence of any judgment, is of much more serious import. In every judgment the agency and presence of three parties are required: *judex, actor et reus.* To condemn without first hearing a defendant, or giving him any opportunity to be heard, is contrary to all principles of equity and law. Therefore, a judgment rendered against a person, without citing him in the ordinary manner, without his appearing, or anything deemed by law equivalent to citation or appearance, is utterly void; and imports such absolute nullity, that any one the least interested in opposing its effects, may have such nullity pronounced. A judgment rendered against a person legally incapacitated to defend himself, or expressly privileged from judicial pursuit, ought to be considered as one rendered without parties, and absolutely void."—(Bernard vs. Vigneaud, 1 N. S., pp. 8 and 9.)

"The defendant not having been legally cited the default and judgment were erroneous."—(Armand vs. St. Julien, 21 A., 631.)

"The only proof of the service is the sheriff's return. Knowledge of the suit on the part of the defendant, no matter how clearly brought home to him, will not supply

want of citation."—(2 L., 172; 4 L., 154; 13 L., 11; 6 R., 9.)

"It is well settled that a judgment rendered against a party who has neither been cited nor appeared, is an *absolute nullity;* that a court can presume nothing with respect to a party being cited; that nothing will cure defect of citation or want of legal service except appearing and *answering to the merits.* The proof of service of citation is not a matter *en pais*, and there can be no evidence of it but the sheriff's return, unless service be waived by the appearance of the party; the service must appear by matter of record and no parol evidence can be received."—(LeBlanc vs. Peyroux, 21 A., 27; 1 R., 30.)

"The citation being the essential ground of all civil actions in ordinary proceedings, the neglect of that formality annuls radically all proceedings, unless he has voluntarily appeared in the suit and answered the demand."—(McCan vs. The Golden Age, 17 A., 91.)

"The return of sheriff cannot be corrected after judgment, so as to cure nullities resulting from a defective citation."—(LeBlanc vs. Peyroux, 21 A., 27.)

It would be superfluous writing to adduce the decisions almost innumerable which exemplify what we have said in regard to what the law ordains as to the sacredness of the right to due process of law before judgment can be pronounced against a party defendant. We simply will refer to a few authorities under the same head decided by the United States courts.—(See Biddle vs. Wilkins, 1 Pet., 686.) That a judgment absolutely void, or where the court had no jurisdiction, may be pleaded in bar or in some cases given in evidence under the general issue.

See, also, The Warren Manufacturing Co. vs. Ætna Insurance Co., 2 Penn.; Lincoln vs. Towers, 2 N. J., 473; Ibid., 511.

Let us now proceed to show what is *due process of law* in Louisiana, in order to establish an action and suit against a corporation.

1st. Art. 420, Revised Civil Code of Louisiana, ordains that "A creditor can require payment of a corporation *only* through its president, syndic, or its attorney in fact."

"Hence, attorneys and officers bind the corporation on such things as do not exceed the limits of their administration."—(Ibid., 439.)

2d. The Code of Practice of Louisiana, in art. 198, sec. 4, says: "That the *citation and petition, or copies thereof*, must be served in suits against civil and religious corporations on their *president in person*, or at their office, if they hold such in permanence, by delivery to some of its officers."

Keeping in view these cardinal and indispensable requisites to suits against corporations, let us apply them to the mode adopted by the plaintiffs in this suit. We will quote in full the return of the sheriff as it appears in the transcript of the record, the same being the foundation of this suit in this court of the United States.—(Record, p. 7.)

"Received, Floyd, Carroll Parish, Louisiana, August 26, A. D. 1867, the within citation, together with a certified copy hereof, and a certified copy of the plaintiffs' petition, on the fourth day of September, A. D. 1867, served said copies by handing same to *Israel Lombard*, a free white person, above the age of fourteen, at and residing at the residence of William Sutton, in said parish and state, he, the said William Sutton, being absent from home at the time of the service hereof. "WM. W. COLLINS, *Sheriff*."

This service and return are at variance with the law.

1. That the service was made on Israel Lombard, a third party, *not* shown to be any way conected with the Board of Levee Commissioners, or with Sutton as the President of the Board of Levee Commissioners.

2. That it was served at the residence of Sutton, he being absent from home, and not at the office of the board, as provided in art. 198, sec. 4, of the Code of Practice.

It is exceedingly doubtful whether this would have been a legal service even for a personal debt of Sutton's instead of being, as he was, the president and representative of a chartered corporation. As such it is a nullity not voidable, but void absolutely.

We, at this point, call the attention of the court to the fact patent on the record, that the return of the United

States deputy marshal is defective in the same respect. It was served on one R. B. Scott, manager of Sutton's plantation.—(Record, p. 17.)

"*Marshal's Return.*—Received August 9th, 1871, by the United States marshal, and on the 12th day of the same month and year served a copy of the within citation and accompanying petition and supplemental petition on Wm. Sutton, named herein, by handing the same to R. B. Scott, manager of Sutton's plantation, at the domicil of said Sutton, six miles above Lake Providence, in the parish of Carroll, the within named Wm. Sutton being absent from the parish and state.

"S. W. REED, *D'y U. S. Marshal.*"

The supreme court, in the case of the First Municipality vs. The Rector of Christ's Church, (2 A., 453,) after reciting the article of the Code of Practice, the court says:

"The return is clearly insufficient, and the case stands before us as one in which there was no citation, in that the return does not state that John Nicholson (the person named in the sheriff's return) was the rector, nor is it pretended that he was; nor does it state that he was agent of the corporation, and *that service was made at its office.* We are asked to remand this case for further proceedings. This the court might, perhaps, in its discretion, grant, if the case were one of an informality of a citation duly served. But here there is an utter absence of legal service."—(3 A., 453.)

The Supreme Court of the United States have said, in the case of the Supervisors of Carroll County vs. The United States ex rel. Reynolds:

"That the construction of the statutes of the state by its highest courts is to be regarded as determining their meaning and generally as binding on the United States courts, cannot be questioned. It has been asserted by us too often to admit of debate."—(American Law Times R., February 7, p. 66.)

That case was an attempt to obtain a mandamus on just such warrants as are sued on here, and the decision of the circuit court reversed the decree, and the mandamus was

refused. We shall have occasion to refer to this case again in the course of our argument.

Having now proved with certainty that the Board of Levee Commissioners were never cited, that in consequence the default appearing in the record is a nullity, and that the said board never appeared or pled or answered to the merits in the state court, and that in such condition it was removed to the circuit court of the United States, we may be permitted to enquire by what species of law or legerdemain the removal from the state court to the circuit court was accomplished; the proceedings in the state court being null, and there being no suit existant.

In the case of Rees vs. Watertown, lately decided by the Supreme Court of the United States, in speaking of the case of Welch vs. St. Genevieve, 10 Am. L. T. R., the court said: "We are not able to recognize the authority of this case. *No counsel appeared* for the city; Mr. Reynolds only as *amicus curiæ*," &c.

In the case at bar, not even were the boards represented by an *amicus curiæ*, or in any other manner; but the plaintiff confirmed his default without opposition; no one representing the Levee Board. Nullity following upon nullity in the proceedings.

We will now proceed to show why the corporation styled the Board of Levee Commissioners for the Parishes of Madison and Carroll were not represented by counsel, or otherwise, in this suit.

These reasons are—

1st. That, in the opinion of counsel, no such corporation existed, inasmuch as –

The last election for members of the board was held in 1859, to hold for two years; that their charter contained no provision for members elected to hold over.

2d. That they were ineligible by disfranchisement, and their offices vacated by act No. 39 of the acts of 1868, passed in pursuance of the requirements of the constitution of this state, and of the acts of Congress, known as the Reconstruction Acts.

3d. That the legislature had repealed the charter in the creation of the Board of Public Works, and in the creation of the Louisiana Levee Company.

Should such conclusions have been in law erroneous, they are at least in obedience to the legislative enactments of the sovereign power under which the parties lived, and to which they owed their allegiance.

4th. That being a political corporation, the legislature had a right to repeal it, unrestricted by any clause of the Constitution of the United States, as laid down in Dartmouth College vs. Woodman, 4 Wheat., 629; 14 How., 276; 14 L. R., 406.

Corporations are dissolved by the death of all the members, or where so few remain that by the constitution they cannot continue the succession.—(1 Dillon on Corp., p. 310.)

The head of the corporation and a quorum of its members must be present at its assemblies.—(Queen vs. Bailiff of Ipswich, 2 Lord Raymond, 1236; 1 Strange, 53; Ibid., 385.)

Corporations cannot exist without a head.—(Cov. and Hughes' Dig., Corp., 10; Modern R., 346.)

Dissolved when one of its several parts becomes extinct, or when reduced below its proper number.—(Rex vs. Passmore, 3 T. R., 199 and 302; 3 East, 213; 4 East., 17; 1 Thomas Coke, marginal page 196; 3 Penn. R., 4.)

We have now traced the history of this complicated and important case from its commencement in 1867 until its removal and filing in this court of the United States in 1871. Here for the first time appears the learned counsel who has now the management of the case. No one better than himself, as having presided on our supreme bench for several years, knew the fatal defects which existed in the proceedings of the suit as they came from the state court, and he proceeds to amend his petition and irregularly supply the defect of citation by oral testimony, in the form of interrogatories on facts and articles to William Sutton, styled

President of the Board of L. C. Sutton answered the interrogatories as a private individual, denying any recollection of any service of any petition on him, and he had in a previous answer, as William Sutton, disclaimed the presidency at the date of pretended service made by the marshal. We have shown that the only proof of the service is the sheriff's return, and that knowledge brought home to him in any other way will not supply the want of citation as regards the corporation of which he was at one time the president.

In the case of Jefferson vs. Kaiser, 17 A., 176, the citation was addressed as follows:

"Mr. Joseph Kaiser, of the City of New Orleans, President of the Jefferson City Railroad Company. We find that Joseph Kaiser appeared and filed an answer for himself alone, not pretending to be or to act as agent of the railroad company."

The judgment in this case was appealed from, and the case remanded.

It is true the learned counsel for plaintiff say this case does not apply, but that is their mere assertion without authority.

The plaintiff's counsel endeavor to construe, as curing the defect, the appearance (for the purpose of disclaiming) of Sutton (p. 20 of Record) where he declares he was not president at the time citation was served upon *him*, as an appearance for the *board*, but such a construction is negatived by the above and other decisions, had in mind by counsel when filing the exception, for that individual alone, knowing that no service on the board could be made except upon the president as such in person, or at the office or domicil of the board in the town of Lake Providence.

In his amended petition plaintiff makes the Police Juries parties to this suit; on what ground he does not state, save that the parish of Madison, or, rather, the parish attorney, had filed an intervention, asking to be allowed to join in the defence, which intervention was soon afterwards with-

drawn, and this is the sole ground he shows to hold the two Police Juries liable in a suit on a draft of a different corporation on its own treasurer.

We venture to say the instance is without parallel in the learned counsel's long experience at the bar, or a precedent in the whole history of the law.

2.—Of the Mandamus.

1. The remedy sought by the plaintiff in filing the petition (Record, p. 38) of 24th January, 1874, for an order to pay his alleged judgment, is virtually proceeding originally for a writ of mandamus, so far as the Police Juries are concerned.

2. It introduces different parties than the original defendants, against whom this judgment was obtained, and asks execution against others, against whom there is no judgment, to wit, the Police Juries of the parishes of Madison and Carroll, but whom he is now suing in this same suit, the which is virtually asking execution before judgment, by way of mandamus.

3. Now, the power to issue the writ of mandamus as an original and independent proceeding has not been conferred by the judiciary act of 1789 upon the circuit court of the United States. The Supreme Court of the United States have decided that coupons attached to bonds issued by a *public corporation*, without a judgment are not entitled to mandamus to compel levy and collection of taxes to pay them.—(Dillon on Corporations, 2 vol., § 692, and notes; Amy vs. Bath Co., 13 Wal., 244.)

"Courts have in few instances appointed, with great reluctance, the marshal as commissioner."—(Dillon, 693, and cases cited.)

In the Supervisors vs. Rodgers, 7 Wal., 175, the appointment of the marshal as commissioner was considered to be authorized by the statute of the State of Illinois, adopted in this particular case, and not by general rule of practice.—(Dillon, note 2, page 785, vol. 2, and cases cited.)

In the case of Riggs vs. Johnson Co., one of the leading cases on this subject, the court says:

"When issued by a federal court, the writ of mandamus is *never* a prerogative writ."—(24 Howard, 97.) "*Out of this district no circuit court can issue it at all in the exercise of original jurisdiction.*"—(6 Wal., 197, 198.)

"It is neither a prerogative writ nor a new suit. It becomes a *substitute* for the ordinary process of execution, to enforce payment *as provided by the contract.*"—(Ibid, 198.)

4. The affidavit must show a *prima facie* case.—(Dillon, vol. 2, Corp., § 697.)

5. The writ must show a refusal on the part of the defendant.—(Ibid, 697.)

The record contains no proof that the defendants, the Levee Board, are in default. The evidence, and only evidence, is the return of the marshal, who returns the writ "*unexecuted*," William Sutton, the president, being dead.

6. The head of the corporation, if such he was, being dead, the suit must abate.

The writ must be directed to the officers of the corporate body, and those only, who are bound to execute it.—(2 Dillon, Corp., § 799.)

The writ in such case may be superseded by motion.—(Ibid, § 702, 712; Secretary vs. McGarrahan, 9 Wall., 299, 311; United States vs. Boutwell, 17 Wall., 605.)

In the case of Rees vs. Watertown, (19 Wall., 107,) this court says:

"That the federal court, sitting as a court of equity, does not possess power to appoint the marshal to levy and collect the tax, nor to subject the taxable property situated within the limits of the city, in any way to an assessment in order to pay the judgment."

And in the case of A. and M. Heine et al. vs. The Board of Levee Commissioners of the parishes of Madison and Carroll et al., (19 Wall., 655,) being the same defendants as in this case, the court held:

"That the fact that this remedy is unavailing, does not confer upon a court of equity power to levy and collect taxes to pay the debts," and that—

"The power to levy and collect taxes is a legislative function in this country, and does not belong to a court of equity, and can only be enforced by a court of law, through the officers authorized by the legislature to levy the tax, if a writ of mandamus is appropriate to that purpose."

It is to be noticed that these decisions of the United States Supreme Court affirmed the doctrine announced by our own supreme court in a similar condition of circumstances.

In Barrett vs. The School Directors (9 A., 514) the Supreme Court of Louisiana said:

"The levying of taxes is the highest exercise of sovereignty, and is vested by the constitution in the legislative branch of the government. All delegations of that power to corporations or individuals, and the exercise of it under those delegations, so far as they do not infringe the constitution and laws, are as the power itself, exclusively under the control of the legislature. If it were otherwise, the judicial and legislative powers could not be kept distinct and separate."

"If the agents selected by the legislature have failed to perform their duty, and the plaintiff is injured thereby, his remedy is by application to the legislature to resume this delegated power, and order the collection of the special tax which the defendants have neglected to assess and collect."—(Ibid., 415. See also 7 Martin, R. 4, O. S., Claiborne vs. Police Jury.)

Indeed, it is plain from the articles of the Code of Practice by which the remedy by mandamus is established (Arts. 829 to 844), that the mandate, when it issues to a corporation, the notice shall be served on the mayor or presiding officer of the corporation, and if the corporation or body of directors disobey the order, *it* shall be punished for the contempt by sequestration of its revenues (writ of distringas), until it yield obedience to the mandate.—(C. P., Art. 844.) And this, and nothing more, is the utmost extent of power bestowed by our courts, to cause obedience to writs of mandamus.

The receiving of negotiable warrants novated any special lien or claim, if any obtained for work done on levees,

and even the lien and privilege of the state itself would no longer affect present proprietors.

"The lien and privilege given by law on the lands in favor of the state and parish for taxes expires in two years from date of assessment."—Buckner vs. Masters, 22 An., 246.)

The Police Juries themselves had no general power to issue such paper.—(See 2 Dillon, 406 and 407, and notes and cases cited; and see the case of Britton and Koontz vs. Police Jury, 15 Wall., 566, for general powers of Police Juries. The attention of the court is particularly called to that case.)

The plaintiff's counsel referred to the proceedings in this case as having been obstinately contested, while the fact is that the suit was first filed 23rd August, 1867, and is now in its tenth year, and it was not removed to the circuit court until July, 1871, having been allowed to slumber for nearly four years, until the idea occurred to the parties that something might be made by its removal, as was the case with various other suits now pending in court, of exactly the same character against these same defendants.

It is a matter of public notoriety that these suits are of the most speculative character, these obligations in suit having for years past been entirely without a market value, not even being worth five cents on the dollar, beyond which rate it is not probable that the various plaintiffs invested in them.

We have thus been compelled to dissect the voluminous record in this case, because, without the court is placed in complete possession of the true condition of the case as it stands, it would be impossible to decide the points presented with exactness.

We call the attention of the court to the date of these warrants drawn in 1859; maturing early in 1860. They are on their face prescribed. The document 10, Record, p. 25, if worth anything at all, is a suspension of prescription for five months and a half. The prescription applying to

the obligations sued on is that of five years.—(C. C., 3505.) The suit was filed in 1867, but no citation served so as to interrupt prescription. If the equally defective service of the marshal afterward were to prevail, there was a period of more than eleven years before service.

These obligations, so issued by corporations, have been declared illegal by the courts of the United States.—(See 15 Wall., 566; Supervisors of Carroll vs. Reynolds, Ann. L. T. R., February, 1874.)

There is annexed to plaintiff's bill of exceptions, Record, p. 46, the testimony of one of his witnesses, A. H. Arthur, who identifies most of these warrants and signatures and endorsements thereon as having been the property of the firm, long since extinct, of Brown & Johnson, in 1862, when New Orleans was captured; that the same were then valueless; that he possesses some, which he took for debt, which he considers of no value.

We venture to add, that this case has nothing in it of those distressing equities in the plaintiff's favor which might incline the just court to extend or to restrict the law so as to meet the ends of what plaintiff assumes to be justice.

Finally, the contracts of this political corporation were contracts made by the contractors with the state, through its special agents, the Levee Commissioners. It is not a contract with the commission or the inhabitant, the proceedings are, as to them, *in invitum*.—(2 Amer. R., 55.)

Whether or not the contract be impaired, the power of taxation in this instance lies only with the legislature of Louisiana.

A judgment is no proof against third persons of the facts upon which it is rendered, and does not conclude them. —(16 An., 135; 20 An., 85; 21 An., 355.)

We, therefore, respectfully conclude—

A.—That the court *a qua* decided correctly in refusing to admit the evidence offered to prove the claims for levee building, it not being admissible after the judgment set up,

nor admissible in the original proceeding as evidence of an extinguished contract when suing upon a new contract, its substitute by novation.

B.—And that the judge *a quo* decided correctly in refusing to grant the writ of mandamus against the Police Juries of the Parishes of Madison and Carroll.

1. Because there was no judgment as to them; and—

2. That the original law proceedings were still pending as to them, and were *lis pendens* (C. P., 335) and were not not yet in judgment.

3. That the law of Louisiana does not authorize the Police Jury to assess but a limited tax, and then only for current expenses, and that for the Police Jury to comply with such a mandamus would be to violate a state law.

4. That there being no judgment against the parish (under sec. 2478, Rev. St., p. 539) the Police Juries could not levy a tax to pay any judgment other than one against the parish, and not one against a corporation whose successor it is not, nor with which it is at all identical.

C.—That the writ of mandamus could not be granted against the Board of Levee Commissioners, for the reasons that—

1. The corporation was extinct by operation of law; the act of 20 February, (pp. 29, 64,) of 1871—"An act relative the Louisiana Levee Company."

2. That there was no president, on whom service could be made, and there being no legal representative.

CC.—Nor against any surviving ex-commissioner, for the reasons that—

1. There was no quorum existing.

2. That the only three ex-commissioners, Morancy, Bedford, and Cochrane, were *functus officio*.

3. By the operation of article 99 of the Constitution of Louisiana, and the act 39, of August 20, 1868; and the act of 1871 creating the Louisiana Levee Company, and repealing all previous levee laws and abolishing all Boards of Levee Commissioners.

4. By the expiration of their two years term of service, and they not being authorized by law to hold over.

5. By the operation of article 143 of the constitution of 1868, abrogating the act of 28th March, 1867.

D.—Because the judgment of the circuit court (Rec., p. 28,) of 13th June, 1872, against the Board of Levee Commissioners, was a *nullity*, for the reason that—

1. There was no legal citation of the corporation as a foundation for suit or judgment.

2. That there being no citation, and consequently no suit in the state court, the federal court was without jurisdiction, there being no cause pending to be removed.

E.—That a writ of mandamus could not issue, for the reasons—

1. For want of jurisdiction in the circuit court to issue such writ as an original or independent proceeding.

2. That it was not competent to assess or cause to be assessed a tax.

3. Nor to appoint the marshal to levy and collect such tax.

F.—1. That the pleas or peremptory exceptions to the original proceeding should be sustained.

2. That the scrip or negotiable obligations sued on are null and void, there being no law authorizing the board to issue such paper.

3. That no testimony, either written or parol, appears in the record to sustain the allegation, or to show, that any of

this scrip was issued for any levee work actually done, or for any legitimate purpose of the corporation.

4. That the judgment (to which the plaintiff is restricted) is merely for a sum of money, and imports no mortgage or privilege.

5. That it cannot be recognized that any lien or privilege was embraced in, or accompanied, said judgment, nor registered according to law, or of record, against the present land-owners sought to be taxed.

All which is respectfully submitted.

SAM'L. R. & C. L. WALKER,
Counsel for Police Juries of Madison and Carroll.

Act 1852 enacted in
Board of Supervisors
Act conformation Tuck 854
15 Wall 524

Woods Ga 2 Ga
3 Ga 119
3 Ga 453
18 Ga 481
14 Ga 585-434
9 Ga 573

Circuit Court of the United States.

J. M. BARKLEY

versus

BOARD OF LEVEE COMMISSIONERS

Plaintiff's Brief on the Petition for Mandamus.

In ordinary cases parties object to the want of citation in *limine litis*. In this case the parties defendants in the case file exception after exception, and contest the case to its end, and when judgment is rendered against them on all their issues they have made by their exceptions, they say the defendant was not cited.

When a party appears and answers in obedience to the command of the citation, addressed to him, we may well suppose that he considers himself served with process.

William Sutton, President of the Board of Levee Commissioners, was ordered to answer interrogatories on facts and articles by the court, and he was again cited, in his official capacity, as he previously had been. In obedience to the citations and the order of the court, he ap-

peared and filed two papers, one a peremptory exception, containing a judicial admission, in these words. that service had been made on him, viz: He "shows that he is not President of the Board of Levee Commissioners, in the levee district in the parishes of Madison and Carroll, and was not President of said Board at the time citation was served upon him in the above entitled cause."

"A man's own allegations on the record of a suit are the highest evidence against him. The effect of it cannot be weakened by any contradicting evidence." De la Croix vs. Prevot's Heirs, 6 Martin, 280; C. C. 2291, [2270.] The next paper filed was his answers (in obedience to the command of the court) on facts and articles.

The issue he made by his peremptory exception was decided against him, and it was thus finally decided that he was the President of the Board of Levee Commissioners when the citation was served on him. The question was tried, and after full argument decided, and can never again be put at issue in this case: His answer, under oath, contributed to the result arrived at by this court. He said, answer to 3d interrogatory, etc.: "I was elected President of the Board of Levee Commissioners of Madison and Carroll in the year 1859; I cannot tell what warrants I signed unless the same are exhibited to me; I have acted as President of the Board of Levee Commissioners since the passage of the act of the Legis-

lature, approved March 28th, 1867; Dr. Samuel P. Bernard was Treasurer, and David L. Morgan was Secretary of said Board at the meeting referred to in the interrogatories. His impression is, that all the records of the Board were destroyed by the overflow in 1867 or 1868." See also 14 Book Minutes, p. 327.

The filing of the peremptory exception and the answers on the facts and articles under the order of this court also prevented Sutton from afterwards denying service. The rule is negatively stated in 19th L. R. 213. "One is not, in contemplation of law, a party to a suit until he has either appeared or been cited to appear in it." See Succession of Perry, 11 Ann. 198; 11 A. 195.

Appearance referred to, in our practice, is made by filing some pleading, say exception or answer.

It is quite clear, therefore, that the pretense that William Sutton, the President of the Board of Levee Commissioners, was not cited, cannot be again examined, for the fact of citation is not only judicially admitted and virtually decreed, but the point was waived by filing a peremptory exception.

The case of the City of Jefferson vs. Kaiser, 17 An. 176, cited by defendants, has no application. The plaintiff, in that case, neglected to take a judgment by default against the company. On appeal for this error of form, the Supreme Court reversed the decree, and remanded the case to be proceeded in according to law. The decree unreversed would have had all the force of any other

decree (C. P. 357, 605, No. 4; 608, 609, 610), and one year's delay would have prevented its reversal or revision in any manner. In the case at bar, it may be observed, though not material, that after the peremptory exception was decided against the President of the Board, a judgment by default was regularly entered against the company.

For the convenience of the court, we will refer the court to the different decrees which are found in MINUTE Books 14 and 15. April 30, 1872, all the exceptions were overruled. B. 14, p. 327.

Judgment by default. B. 14, p. 338.

Default, May 3; B. 14 p. 341.

Entry May 8; B. 14, p. 348.

Default May 14; B. 14, p. 356.

May 20, exceptions overruled; B. 14 p. 371.

Minutes Book 15, p. 161, exceptions overruled.

The last named exceptions included the exceptions of prescription of five years, and left almost nothiug to be decided.

An examination of those overruled exceptions will show the court, how little remains to be decided in the issue now presented to the court.

A copy of the judgment is annexed to the petition for a mandamus.

The mandamus is in the form prescribed by Code of Practice, with the proper *affidavit*. The fi. fas returned *nulla bona* are in the record. The court, by special order, di-

rected how the mandamus should be served. Document 10 in evidence, extract of the minutes shows that Morancey, Bedford & Cochran have been acting since 1867, and during the pendency of this suit, as Levee Commissioners.

The levee warrants (or scrip,) are admitted to have been issued by the Board or its officers. Exceptions of Morancey, Bedford & Cochran, No. 3 of last page of exceptions.

The following brief index will show the court the most important legislation, and make references thereto easy.

ACT 1852.

Power to tax given Police Jury of Carroll, act 1850, page 75.

Board of Levee Commissioners, legislation organized act 1852, page 234.

Board appointed, sec. 10, page 235.

May, Elect and fill vacancies, sec. 11.

" Make By-Laws, sec. 12, page 236.

" Prescribe duties for Inspectors, sections 16, 22, page 237.

ACT 1853.

Acts 1853; page 44, allows assessment for levees equal to three hundred per cent. on State and mill tax for Madison and Carroll, sec. 2, page 44.

Makes commissioners elective, sec. 4.

May fill vacancies, page 45, sec. 11.

May make regulations to facilitate collection of taxes, sec. 13.

Continued in office, sec. 17, page 46.

Power conferred, page 45, sec. 10.

Treasurer.

Carroll exempt from tax, act 1853, page 203, 2d sec.

The reason of this is doubtless the act of 1850.

1857.

Authorizes appointment of Levee Tax Collector, act 1857, page 35.

Repeals other laws.

Act 14th March, 1857, page 105, authorizes an unlimited tax on all alluvial lands of Madison and Carroll, acts 1857, page 105.

1858.

The act of 1858 is important, for it provided for the collection of the taxes, on the faith of which the levees were built, and enters into the contract sued on.

Act 1858, page 128, sec. 1. Authorizes a specific tax of *ten cents* per acre of the alluvial lands in the levee district,

and also,

three hundred per cent. on the State and mill tax, and on all property assessed in said district except *lands:*

and decclaes, sec, 3,

that the tax herein imposed shall be a *first lien* and privilege on the said lands.

And the process of seizure and saleto issue to collect tax as in case of a mortgage

State tax to be paid before any title can pass.

1859.

Acts 1859, page 12, makes Levee Board a Corporation, with power to contract, and be contracted with, page 13.

Powers of the old Board continued in the Corporation, (page 15, sec. 10.)

So that it is not important to examine the provisions, either in the acts of 1859 or 1867, intended to authorize the Company to raise money on bonds and coupons

Act 1861.

All power was withdrawn from the Board of Levee Commissioners, except to assess and collect such levee tax as may be necessary to *meet the present indebtedness* of said Board *in bonds and other liabilities.* (1861, p. 96.)

By implication, the Board was continued for the purpose of collecting taxes to pay debts.

Carroll made a separate Levee District, but no new corporation was created, so the Police Jury was left as the corporation to represent the parish under the general laws. Act 1861, p. 110.

Madison another Levee District, Act 1861, p. 118.

These two parishes then stand, as to all powers not left in the hands of the Board of Levee Commissioners, precisely as the parish of Tensas now stands. See Britton vs. Police Jury, 15 Wallace, 568. The Levee Commissioners bound the Police Jury of Tensas without express enactment.

1867.

Act 1867, p. 265. authorized the Board of Levee Commissioners, (referring to the act of 1859,) to issue bonds.

Former powers continued, section 9, p. 271, in these words: "That the provisions of this act are not to be understood as impairing or limiting *any of the powers, rights or duties* of such Board of Levee Commissioners as now exist by law, etc.

Members of the Board continued in office, with power to fill vacancies, and all powers granted by any of the acts, to be exercised by them. P. 273, sec. 10.

The article of the constitution impairing contract is article 149.

Act of 1869 in *pari materia*, page 69, as to payment of judgments against parishes.

Decisions of Supreme Court of Louisiana on the validity of these levee taxes, etc.

Yeatman vs. Crandell, 11 Ann. 220.

Walton vs. Shelton, 14 Ann. 498.

Templeton vs. Morgan, 16 Ann. 441.

After final judgment and pluries execution, it cannot

be a subject of inquiry in the same court whether the obligations merged in the judgment, were strictly formal or not. Were it a question to be reviewed here, there would be no trouble in establishing the correctness of the first judgment. The Levee Board were authorized to contract, and if they found the addition of "or order" in the warrants, aided the contractors in getting money to facilitate their work, they could insert it, and, although not in evidence, it may be remarked as a part of the history of the levees, that there is testimony on file that the money on most of these warrants was advanced by planters owning property subject to innundation, to prevent the contractors from failing. See Act 1859, p. 13, sec. 1; Form of the Tensas warrants, 15 Wallace, 567.

The levee warrants made on the faith of the laws then in force, and having in themselves the most meritorious of considerations, are protected by constitution of the United States.

See Van Hoffman vs. City of Quincy, 4 Wall. 549.
Butz vs. City of Muscatine, 8 Wal. 584.
Dillon, Municipal Corporations, sec. 114, 115,
Curran vs. State of Arkansas, 15 H. 312.
2 Kent, ed. 1854, p. [307], note a,
Cooley on Const. Limitations, 289, 290, 292.
Hawthorn vs. Caleff, 2 Wal., R. 10.
Contract cannot be violated by a State constitution.

Jefferson Branch Bank vs. Shelly, 1 Black. 435, No. 7.

Davis vs. Gray, 16 Wal. 232.

MANDAMUS APPROPRIATE REMEDY.

"In the absence of any special provision of law as to the manner in which the levee tax collector should make the sales of the property of delinquent tax payers, *we must have recourse* to other laws *in pari materia.*" Templeton vs. Morgan, 16 A. 441.

The act of 6th March, A. D. 1869, p. 69, is in *pari materia.*

See Ray's Revised Statutes, 1869, p. 539, secs. 2747, 2748.

This is, therefore, a proper case for a mandamus. See analogous case in WELCH vs. ST. GENEVIEVE, 10 AM. LAW REG., P. 512.

U. S. ex. rel. Lansing vs. Muscatine Co., 9 Am. Law Reg. 415.

Riggs vs. Johnson Co., 6 Wal. 198.

Butz vs. City of Muscatine, 8 Wal. 575, 884; 6 Wal. 189, 193.

Benton vs. Iowa City, 7 Wal. 313.

The Mayor vs. Lord, 9 Wal. 409.

Supervisors vs. Duraut, 9 Wal. 415.

Amy vs. The Supervisors, 11 Wal. 136.

Dillon, p. 646, sec. 693.

Com'rs Knox Co. vs. Aspinwall, 24 H. 376.

Supervisors vs. U. S. 4 W. 435; Van Hoffman vs. Quincy, 4 Wal. 535.

The State courts exercise a much more extended jurisdiction over the subject than we ask the court to do. See Watts vs. Police Jury of Carroll, 11 Ann. 141; Gillespie vs. Police Jury of Concordia. 5 Ann. 403.

The court will find in a brief space, the nature of the corporation represented by the Police Jury, in II Hennen's Dig., pp. 1192 and 1193.

Whoever has resided with his wife, children and servants, (to say nothing of his horses and other live things,) behind a levee during a period of high water, and felt the insecurity and, with all his neighbors, given an almost sleepless watchfulness to the dangerous levees in his vicinity, can appreciate the value of the levee contractor's work. But this is not all: what, without his labor, is valueless, becomes, with it, the most fertile and wealth producing. Every dollar he expends in payment of his hands is finally represented in the alluvial lands he has protected, and such lands are more benefitted than they could be by any other embankment or by any building or work which could be made on them. Now, as the contractor's money goes into and increases the value of the land which is bound by the law for the tax, and as this land thus benefitted is not left to the creditors on the dissolution of a municipal corporation, as it is where a bank, manufactory or

monied corporation forfeits its charter, there is very little analogy between the Board of Levee Commissioners and such corporation.

The inhabitants of the levee district, after trying all other means to protect themselves from a great annual danger in vain, and to avert future calamities, had this Board of Levee Commissioners created to represent them, to protect them, and on the pledge of a specified annual tax which they were bound by law to pay, they contracted through their Board with the levee contractor for an uniforn system of levees, which should be everywhere strong and safe, and not depend upon spurring up the negligent and indolent to make their levees as high as their neighbors. After the adoption of this general system, the prosperity of the levee district was unexampled.

If by the dissolution of the corporation, the lands benefited by the contractor's labor were left to the creditors, the injustice would not be so flagrant. But by destroying the corporation the tax payer, whose wealth has been increased, expects to free himself from all liability. But we say, the levees were built for the people of the district by their agent, the Board of Levee Commissioners, and if they destroy that agent and put up two other agents to represent them, then they must pay through their new agents, and so the Parish of Madison thought when they first intervened in this suit.

We do not think New Orleans could escape her enor-

mous debt by getting herself turned back into three independent municipalities as, in old times.

The Levee Commissioners, however elected, represent the whole district, and act for the whole district. The survivors have power to fill vacancies. We find the Board knocking at the door of justice, and collecting penalties as late as 1868, and it is evident from this suit that the refusal to act is in order to defeat the plaintiff's judgment. See Board of Levee Commissioners vs. Harris, 20 Ann. 201.

There is no doubt that there are two clear remedies open to the court in this case ; the one is to peremptorily command the present Levee Board to collect the taxes; the other is, to follow the precedent in the case of Welch vs. St. Genevieve, 10 Law Register, p. 512, and refer it to the Marshal. This latter would, we think, be the best mode.

The act of 1858, p. 128, sec. 1, limits the tax, and if enough should not be produced the first year to pay the judgment, it can be collected from year to year until it is paid. We have, however made no estimate how much would be produced.

We have placed among the papers rulings which we pray the court to adopt.

THOS. McCAY,
RACE, FOSTER & E. T. MERRICK,
for Plaintiff.

CIRCUIT COURT, U. S.

No. 6497.

J. M. BARCLAY,

vs.

THE BOARD OF LEVEE COMMISSIONERS.

Brief on the Exceptions.

1st.—The peremptory exception that Sutton is not the President of the Board of Levee Commissioners, is an issue which concedes the jurisdiction. It raises an issue which is a confession that the Circuit Court has jurisdiction, for it asks that Court to try the ques-

tion. The general rule is that a plea in bar admits the ability to sue. Yeaton vs. Lynn, 5 Peters 223.

The Court having jurisdiction conceded to try the question whether Sutton is President, is competent to try all other questions. 14 Howard 509.

The peremptory exception ought to have shown who was President if Sutton was not. Chitty's Pleadings, p. 457, 458. The plea is not sustained by proof.

2.—The Police Jury of the Parish of Madison intervened. That body therefore is easily answered by showing that the party was entitled to remove the cause, which is done by the more formal authentication of the documents which were satisfactory to the State Court. The record as amended by leave of the Court, shows that the case has been rightfully removed. See 14 Stet et Laye 558, 559. 9 Wall 390.

3.—The pleas of the Parish of Carroll are not maintainable. When suits are commenced in the State Courts it is not necessary to aver that the original parties assignors were citizens of other States. The jurisdiction is recently enlarged and it is sufficient if the parties are citizens of different States and will

make the oath and give the bond. 9 Wallace 390. 14 Stet et Larze 558.

Again, the exceptions of the Parish of Carroll are waved by the answer.

4.—It is not necessary to reply to matters urged in the oral arguments, and not before the Court, on the exceptions. The exceptions speak for themselves.

5.—The *jurisdiction* of the Court being conceded by the exceptions of Sutton as to the main action, it cannot be defeated by objections made by the Police Juries of said Parishes of Carroll and Madison.

6.—It is alleged in the amended petition that the Police Jury alleged in its intervention that the Board of Levee Commissioners had ceased to exist as a juridical person, and avers that plaintiff's rights cannot be defeated by the voluntary abandonment by the Levee Commissioners of their office, and that petitioners have a right to hold said Board, who created said obligations, as still in office. Now Sutton in his answer to interrogatories, does not deny that he was President, and he does not say that he has resigned, or that there has been any one elected in his place.

The office held by Sutton was a municipal one, or at least a public one, and Sutton was continued in office by the force of the Constitution. Art. 122.

7.—The parties excepting have not complied with the 8th Rule of this Hon. Court, and cannot be heard upon their said exceptions for want of the verification required by said Rule.

RACE, FOSTER & E. T. MERRICK,
And T. S. McCAY,
Of Counsel for Plaintiff.

2 Sawyer 170
15 Wall

No. 81 Bleggore

Supreme Court of the United States.

No. 81.

J. M. BARKLEY, Plaintiff in Error,

vs.

THE BOARD OF LEVEE COMMISSIONERS.

Additional Acts and Extracts of Statutes and Authorities filed by Plaintiff in Error by permission of the court.

Article 122, Constitution of Louisiana, 1868:

"All officers shall continue to discharge the duties of their offices until their successors shall have been inducted into office."

See Constitution, Appendix to 20 Ann., p. 601.

Revised Statutes of Louisiana, 1856, p. 395, sec. 2:

"SEC. 2. All State and parish officers shall, after the expiration of their time of service, continue to perform the duties of their office until their successors, or themselves in case of appointment or election, shall be inducted into office, by performing the formalities required by existing laws, *so that no interruption may occur in the discharge of any public duty required by said offices*, under the same penalties, bonds, obligations, and securities as were given and entered into by them at the time they were elected to said office."

Act of 1861, relative to the powers of the Board of

Levee Commissioners of the parishes of Madison and Carroll:

"SEC. 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That for the future it shall not be lawful for the Board of Levee Commissioners of the parishes of Carroll and Madison to assess and collect any more levee tax in Carroll, except such levee tax as may be necessary to meet the present indebtedness of said Board in bonds and other liabilities."

Section 1 of acts of 1861—An act constituting a portion of the parish of Carroll a levee district—(Stats. 1861, p. 110:)

"*Be it enacted, &c.*, That all that portion of the parish of Carroll lying between the base of bayon Mason Hills and the bank of the Mississippi river be and is hereby constituted a levee district."

This act consists of twelve sections.

Section 1 of act of 1867:

"An act to authorize the Board of Levee Commissioners of the levee district in the parishes of Madison and Carroll to issue bonds in settlement of the interest which has accrued and may accrue to the 1st of October, 1867, upon the bonds heretofore issued by the board under the provisions of the act approved 10th March, 1859, and to agree with the holders thereof for a delay of payment of said bonds.

"SEC. 1. *Be it enacted, &c.*, That the Board of Levee Commissioners of the levee district in the parishes of Madison and Carroll be and they are hereby authorized and empowered to issue their bonds for a sum not to exceed one hundred and sixty-seven thousand dollars, to be used and appropriated at par in the payment of the interest which has accrued and which may accrue up to the first day of October, eighteen hundred and sixty-seven, and which is unpaid upon the bonds issued by said board under the authority of an act entitled an act supplementary to the several acts organizing the Board of Levee Commissioners for the levee districts in the parishes of Madison and Carroll for the better protection of the same from inundation.

* * *

"SEC. 9. *Be it further enacted, &c., That the provisions of this act are not to be understood as impairing or limiting any of the powers, rights, or duties of the said Board of Levee Commissioners as now exist by law, or to restrict, limit, or take away any of the powers, rights, or duties* of the *said Board* of Levee Commissioners as now exist by law, or to restrict, limit, or take away any of the rights and powers heretofore given to the holders of the bonds issued under the said act approved March tenth, eighteen hundred and fifty-nine, or which they may now have, to require payment with all coupons of interest of the said bonds issued as aforesaid, and to demand the necessary assessments and collections for the payment, the sole purpose and intention of this act being to authorize and empower the said Board of Levee Commissioners to arrange with the holders of said bonds, issued under the provisions of said act of the tenth of March, eighteen hundred and fifty-nine, for the settlement thereof, with the interest which has or may accrue up to the first day of October next, by funding the same, and by postponing the maturity of said bonds, as provided for above; and if said Board of Levee Commissioners decline or refuse to exercise the powers conferred on them thereby, then this act shall be null and void.

"SEC. 10. That for the purpose of carrying into effect the provisions of this act, and of the above-recited act of the tenth of March, eighteen hundred and fifty-nine, the Board of Levee Commissioners shall continue in office, with the power of filling vacancies in said board until their successors shall be duly elected and qualified according to law, and all powers granted to said Board of Levee Commissioners by any of *the acts aforesaid or by any other acts* shall and may be exercised by the members of the board now in office, and any members appointed or elected as above described." (Acts 1867, pp. 264, 271, 272.)

Repealing clause of act of 1871, referred to by counsel for plaintiff in error—Act No. 4:

"Be it enacted that all acts and parts of acts inconsistent with this act are hereby repealed."

Repeating clause of act 1872, sec. 4: "That all acts or parts inconsistent with this act are hereby repeated."

Act of 1866, referred to in Kennard *v.* Laforge, 23 Ann., 168:

After ratifying the appointment of the Governor of a

Board of Levee Commissioners for the State at large, sec. 3 provides as follows: "*Be it further enacted, &c.*, That the said Board of Levee Commissioners shall have full power to let out contracts for the building and repairs of all levees in the State which, in their judgment, are necessary to protect the alluvial lands from being overflowed. They shall have entire control and management of the levees let out by them, with powers to prescribe and regulate dimensions and specifications to be built." * * * (Acts 1856, p. 36.)

The case of Kaiser *v.* The City of Jefferson was decided on appeal taken in due time on a question of form. Kaiser was cited as an individual, and as president of the company. He answered only in one capacity, and a formal default was needed in the other. The case was sent back on account of the mere error of form. (17 Ann., 176.)

In the case at bar Sutton is cited in his capacity of President of the Board of Levee Commissioners, residing, &c. (Rec., p. 6.) Hence the judgment by default against him binds him in the capacity in which he was sued.

As said in argument, if one year had elapsed without an appeal or action of nullity, the judgment would have been *res judicata* and irrevocable.

"The nullity can be demanded on the appeal only while the appeal is still pending, and where the nullity is apparent on the face of the record." (C. P., 609.)

"The party praying for the nullity of a judgment before the court which has rendered the same must bring *his action by means of a petition, and the adverse party must be cited to appear as in ordinary suits.*" (C. P., 610.)

"No appeal will lie except as to minors after a year has expired, to be computed from the day the first judgment was rendered, if the party claiming the same reside in the State, and after two years if he be absent therefrom. This delay relates to minors, must be computed from the day of their coming of age." (C. P., art. 393.)

"A judgment may be annulled at the instance of a party for certain defects *of form*, and for causes which will cover all cases of fraud, and which are provided against by express legislation. (Code Practice, art. 604, *et seq.*) *Until*

the judgment be annulled, it stands as conclusive between the parties. The authority of *res judicata* takes place only with respect to what was the object of the judgment." (Succession of Durnford, 1 Ann., 92; Mary A. Weil *v.* The Sheriff of St. Helena, 20 A, 247; Legendre *v.* McDonough, N. S. S., 14; Knox *v.* Duplantier, 21 Ann., 294; Gay *v.* Marrioneaux *et als*, 21 Ann., 288; Ingraham *v.* Richardson, 2 Ann., 840, 841; Hall *v.* Beggs, 17 Ann., 238.)

In the Louisiana practice, arrests, attachments, &c., consist of a double action, viz, the original petition and the conservatory process. The latter may be excepted to or set aside on motion without affecting the main action. Hence a motion to set aside an arrest or attachment would not affect the main action. (Code of Practice, sec. 4.)

"Of the conservatory acts which accompany the demand:"

"ART. 208. He who brings an action may, in certain cases provided by law, obtain provisional orders either against the person of his debtor or his property, in order to give effect to the suit which he has brought or intends to institute against him.

"ART. 209. There are five sorts of conservatory acts, viz: arrest of debtors, attachment in the hands of third persons, sequestration, provisional seizure, and injunction." (Knox *v.* Conner, 13 Ann., 88.)

The case of Slocumb *et als.* *v.* Bowie *et als.*, 13 L. R., p. 10, cited by defendant, is commented upon in Loughery *v.* Crooks, 5 Ann., 486, and the court speaks of the *reasoning as unsatisfactory.*

Counsel ask this court to go much further than any Louisiana court has yet gone. It is as, we have seen, the settled law of Louisiana *that no final judgment can be controverted unless the same is so done either on a direct appeal from the judgment or by a direct action of nullity.* What do we see? Three parties are cited into court, and they employ the same counsel to defend them all, viz, the same counsel who appears in this court. One of the defendants takes his citation and petition in his hand, and in obedience to the command of the same he answers that part of it under oath which he is required to answer, and this answer, we have

seen, is a part of the pleadings in the case. The co-defendants, represented by the same counsel, stand by and interpose no objection to the same. They stand by and see a final judgment rendered against their co-defendant, and thus acquiesce in the same. When four executions have issued in vain on the judgment, they solemnly declare that the judgment possesses one of the highest elements of a judgment and operates as a merger of the original obligations, and precludes the party from giving evidence of the fact that the obligations were given for work done on the levees. (Rec., p. 50.) As the president of the board had power to acknowledge service or to confess judgment, as we have seen in the case of 11 Ann., no court in Louisiana, on an appeal or action of nullity in due time, would have relieved the party from the effects of his acts and judicial confession.

Again, we have seen that the action of nullity does not lie where there is an appearance. (C. P., art. 606, No. 4, copied in the second brief, p. 2.) See also citation from Bernard *v.* Vigneaud, (1 N. S., 8 and 9, page 15 of *defendant's* brief. Also 11 Ann., 198, succession of Perry, cited page 2 plaintiff's second brief, and 11 Ann., 195; Sexton *v.* Brooks, 12 L. R., 596.

On the question of disfranchisement:

In Louisiana, as elsewhere, the question of an officer's right to continue in office is a question of public order and for the State. It is not pretended that the Governor ever declared these offices vacant, and it is not shown that the Board of Levee Commissioners did any of the things alleged in the plea. Private individuals cannot declare offices vacant. It may also be remarked that article 99 of the Constitution of Louisiana was soon after changed by amendment. (Atchafalaya Bank *v.* Dawson, 13 L. R., 506.)

Besides, it is difficult to see how the defendants in error can, against the settled law, call upon this court to revise the finding of fact on the question. The rulings of the judge *a quo* on the point were acquiesced in by the defendants. They did not except to the rulings of the judge, but

on the contrary are deemed to have acquiesced in the same. They have nowhere brought themselves within the provisions of the act of Congress. If they had desired to urge error in the rulings of the judge *a quo*, they should have excepted to the same. The first and second propositions of law submitted to Judge Woods by plaintiff (Rec., 51) were not excepted to, and cannot therefore be contradicted by either party. (Revised Statutes United States, secs. 649, 700; Desty., pp. 67, 98.)

Parties who are cited into court in order to defend the action, (as in the case of principal and surety or any other case where the judgment against one may prejudice the other,) and they do not oppose the proper defenses at the right time, they are bound by the judgment so far at least as to stop them from saying it is not a valid judgment; otherwise it would be a vain thing to cite in all parties in interest.

See Smith *v.* Poydens, 1 Rob., 384.
Johnson *v.* Wild, 8 Ann., 129.
Bedell *v.* Haystutrix, 21 Ann., 643.
Saul *v.* His Creditors, 7 N. S., 433.
Smith *v.* Lelande, 1 Rob., 384.
Succession of Aquillard, 13 Ann., 97.

The question of prescription was made by the police juries in the course of the proceedings after evidence and a trial; the plea was overruled, and no bill of exceptions was taken or reserved by either party. This involved also the question as to whether the judicial admission of record of service of citation was conclusive on the parties, as the courts and civil code declare.

The law, as stated by the counsel for the parish of Madison, as to the levee warrants being really a debt against the parish, is recognized not only by the courts, as we argue, but by the Legislature, because, in the 17th section of the act of 1861, which is copied into the brief, it describes them *as liabilities of the parish.* (See our original brief, p. 11.)

It seems to us, therefore, whenever the levee board really ceases to exist, the two parishes are bound by the judgment for the same debt.

As the police juries are estopped by the judgment rendered in the case to which they are parties, they might be made the instruments of enforcing the judgment, just as the sheriff or other tax collector could have been ordered to do under the law *in pari materia* in existence when the work was done, although not a party to the suit. If this view of the remedy should not meet the approbation of the court, it seems to us the police juries ought to be retained in the cause for further proceeding.

It seems to us also as very clear that the survivors have the power to fill vacancies.

They continued to act after the commencement of this suit, (see "Doc. 10," p. 25,) and they were busy collecting penalties in 1868.

Board of Levee Commissioners *v.* Harris, 20 Ann., 201.

So also under the decision in 16 Ann. Laws *in pari materia* might be invoked, and as the law stood at the time the work was done, the marshal, in the place of "the sheriff or other tax collector," might be ordered to collect the tax "imposed" by the Legislature for the purpose of paying for the work.

The judgment affirmed the character of the demand as alleged, and sufficient appears in the allegations of the petition. (Printed Rec., p. 15; Transcript, 38.)

It is hardly necessary to observe that it is well-settled law in Louisiana (as we believe elsewhere) that an answer to the merits admits the sufficiency of the petition.

Article 2270, Civil Code: "The judicial confession is the declaration which the party or his special attorney in fact makes in a judicial proceeding. *It amounts to full proof against him who has made it.* It cannot be divided against him. It cannot be revoked, unless it be proved to have been made through an error in fact. *It cannot be revoked*

under pretense of an error in law. " (Art. 2270, in Code of 1827; Gridley *v.* Conner, 4 Ann., p. 416; Danton *v.* Erwin, 5 Ann., 18; Bender *v.* Belknap, 23 Ann., 764.)

"This amendment should not have been permitted. It was utterly inconsistent with the previous pleadings and the party's own allegations." (Barrow *v.* Bank of La., 2 Ann., 455; Kohn *v.* Marsh, 3 Rob., 48; Deggs, Hobson & Co. *v.* Parish, 18 L. R., 6; Powell *v.* Graves, 14 Ann., 860.)

Form of plea of prescription and proof. (Aillot *v.* Aubert, 20 Ann., 509; Succession of Montament, 15 Ann., 332.)

Not having seen defendant's last brief, we are unable to reply to the same.

E. T. MERRICK,
G. W. RACE,
For Plaintiff in Error.

an 2736a10 1857